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In the

# Supreme Court of the United States

1965

No. [redacted] 213

H. T. SHELTON,

*Petitioner,*

*v.*

MISSOURI-KANSAS-TEXAS RR. Co.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

*To the Court of Civil Appeals for the 5th Supreme Judicial District of Texas*

CHARLES GULLETT,
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Denison, Texas,
ROBERT DOSS,
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Denison, Texas,
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## PETITION FOR WRIT OF CERTIORARI

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*To the Court of Civil Appeals for the 5th Supreme Judicial District of Texas*

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Petitioner, H. T. Shelton, prays that a Writ of Certiorari issue to review the Judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas entered in the above entitled case on May 15, 1964.

## CITATION TO OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas is reported in 383 S.W. 2d 842, and is appended hereto. (Appendix A, p. 45) The Su-

preme Court of Texas wrote no opinion in refusing Petitioner's Application for Writ of Error, and that Order is appended hereto. (Appendix A, p. 70)

## GROUNDS OF JURISDICTION

The Judgment of the District Court of Texas, Fifteenth Judicial District, in favor of Petitioner for the sum of $25,000.00, was entered on May 20, 1963. (Appendix A, p. 35) On May 14, 1964, the Court of Civil Appeals reversed and remanded that Judgment. (Appendix A, p. 57). The Order denying Petitioner's Motion for Rehearing by the Court of Civil Appeals was entered on October 9, 1964, at which time the Court of Civil Appeals rendered a further Opinion on Rehearing. Petitioner's Second Motion for Rehearing was denied by the Court of Civil Appeals on November 6, 1964. (Appendix A, p. 58) Petitioner's Application for Writ of Error to the Supreme Court of Texas, timely filed, was refused on January 27, 1965, no reversible error. (Appendix A, p. 70) The Supreme Court of Texas entered an Order denying Petitioner's Motion for Rehearing on his Application for Writ of Error on March 10, 1965. (Appendix A, p. 71) The Court of Civil Appeals thus became the highest Court in Texas in which a decision could be had. *Panhandle Eastern Pipeline Company v. Calvert*, 347 U.S. 157, 98 L. Ed. 583, 74 Sup. Ct. 396 (1954).

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Sec. 1257, Subsection 3, because Petitioner's

cause of action arises under the Federal Employers Liability Act, 35 Stat. 65, 45 U.S.C., Sections 51, et seq., and because a right and privilege is specially set up and claimed under this Act of Congress, and further because the Court of Civil Appeals has decided substantive questions arising under the Federal Employers Liability Act not heretofore determined by this Court, and has decided them in a way probably not in accord with the applicable decisions of this Court.

## QUESTIONS PRESENTED

### 1.

Does not *Arnold v. Panhandle & Santa Fe Ry. Co.*, 1 L. Ed. 2d 889, 353 U.S. 360, 77 Sup. Ct. 840, deny the Texas Courts authority, in a Federal Employers Liability Act suit, where the jury returned a negative answer to a general Special Issue on which Petitioner had the burden of affirmatively establishing that his employer failed to furnish him a reasonably safe place to work, to hold that such negative answer is exhaustive and controlling, and therefore in fatal conflict with another Special Issue on which Petitioner successfully met his burden of proof, the Jury having specifically found, in answer to such issue, negligence on the part of the railroad in permitting chatt, gravel, rocks, mounds of dirt or debris to remain in the area of its switching yards where Petitioner alighted from a car, thus causing his injury.

2.

Has Petitioner been deprived of substantive rights afforded him by Congress under the Federal Employers Liability Act by the Texas Courts in denying him a recovery on the basis of local practice, contrary to the decision in *Arnold v. Panhandle & Santa Fe Ry. Co.*, 1 L. Ed. 2d 889, 353 U.S. 360, 77 Sup. Ct. 840, after he had secured an affirmative jury finding in his favor in response to a Special Issue finding his employer negligent in permitting chatt, gravel, rocks, mounds of dirt or debris to remain in an area of its switching yards where Petitioner alighted from a car causing his injuries, the jury failing to answer in Petitioner's favor the question of whether Respondent failed to furnish him a reasonably safe place to work?

3.

Have the Texas Courts denied Petitioner's established substantive rights under the Federal Employers Liability Act by refusing to reconcile a negative answer to a general Special Issue inquiring whether Respondent failed to furnish him a reasonably safe place to work with an affirmative finding by the jury in answer to another Special Issue that Respondent was negligent in permitting chatt, gravel, rocks, mounds of dirt or debris to remain in the specific area where Petitioner was injured as he alighted from a car, where such answers could be reconciled on several reasonable grounds so as to avoid a holding that a fatal conflict existed in such answers?

## MATERIAL FACTS

Petitioner, H. T. Shelton, an employee of Respondent, Missouri-Kansas-Texas Railway Company, brought suit against it in the District Court of Grayson County, Texas, 15th Judicial District, for damages for personal injuries sustained while employed as a switchman in Respondent's Yards, injuring his back when he stepped on debris accumulated along the tracks in the area where he alighted from a car. This cause was tried to a jury on the 25th day of February, 1963. On the basis of the jury's answers in response to 67 Special Issues, (Special Issues are used in Texas rather than a general verdict), Judgment was entered for Petitioner on May 20, 1963 in the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) (Appendix A, p. 35), to which action Respondent duly excepted and perfected his appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

Following perfection of an appeal by Respondent, the Court of Civil Appeals rendered a Judgment reversing and remanding this case for a new trial solely on the narrow proposition that the jury's answer in response to Special Issue No. 2, inquiring whether Respondent failed to furnish Petitioner a reasonably safe place to work, and Special Issue No. 9, inquiring whether Petitioner permitted chatt, gravel, rocks, mounds of dirt or debris to remain in the area where Plaintiff was injured as he alighted from a car, were fatally conflicting and mutually destructive of each other so as to preclude a Judgment in Petitioner's favor. (Appendix A, p. 52) All other contentions of Respondent were re-

jected. The Court of Civil Appeals held that the opinion of this Court in the case of *Arnold v. Panhandle & Santa Fe Ry. Co.*, 355 U.S. 360, 77 Sup. Ct. 840, 1 L. Ed. 2d 889 controlled disposition of this case, stating:

> "The Arnold Case is really authority for holding that the answers here are in conflict." (Appendix A, p. 53)

Petitioner's Motion For Rehearing was overruled on October 9, 1964, and his Second Motion For Rehearing was overruled on November 6, 1964. The Supreme Court of Texas refused further review, and Petitioner now applies for this Writ of Certiorari.

The jury, in response to special issues submitted to them, convicted Respondent of negligence in permitting chatt, gravel, rocks, mounds of dirt or debris to remain in the area where he alighted from a car. These issues were:

> "SPECIAL ISSUE NO. 8:
>
> "Do you find from a preponderance of the evidence that Defendant permitted either chatt, gravel, rocks, mounds or dirt, or debris to remain in the area of the hump where Plaintiff alighted from said caboose.
>
> "ANSWER: "*Yes.*"
>
> "SPECIAL ISSUE NO. 9:
>
> "Do you find from a preponderance of the evidence that such act in permitting either chatt, gravel, rocks, mounds of dirt, or debris to remain in the area of the hump where Plaintiff alighted from said caboose, if you have so found in answer to the preceding Special Issue, was negligence, as defined herein?
>
> "ANSWER: "*Yes.*"

"SPECIAL ISSUE NO. 10:

"Do you find from a preponderance of the evidence that Plaintiff's injuries, if any, resulted in whole or in part from such negligence, if any, you have found in answer to the preceding Special Issue?

"ANSWER: "*Yes.*" (Tr. 86)[1] (Appendix A, p. 36)

The jury did not find any act of negligence on the part of Petitioner which contributed to cause his injuries. The only other Special Issue submitted and vital to the questions now raised read as follows:

"SPECIAL ISSUE NO. 2:

"Do you find from a preponderance of the evidence that on the occasion in question Defendant failed to furnish Plaintiff a reasonably safe place in which to work?

"ANSWER: "Yes" or "No."

"ANSWER: "*No.*"

"You are instructed the Defendant was under a duty to exercise ordinary care to furnish Plaintiff a reasonably safe place in which to work, and this duty was a continuing one even though the work may have been fleeting or infrequent.

"You are further instructed that the duty to exercise ordinary care to furnish a safe place to work does not have reference only to the physical condition of the place itself but also has reference to the negligent acts, if any, you find of Defendant's employees on the occasion in question.

"You are further instructed that this duty is a duty which becomes more imperative as the risk increases." (Tr. 84) (Appendix A, p. 36).

[1] "Tr.", when used herein, refers to the Transcript, and "S.F.", when used herein, refers to the Statement of Facts, which are two separate documents comprising the Record under Texas Appellate Practice.

The jury did not find Respondent's employees guilty of negligence with reference to the movements of the train from which Petitioner alighted before he fell, nor with reference to the movements of another train moving in the opposite direction on another track which struck Petitioner after he alighted. Petitioner testified that the aisles and passageways in and around the railway tracks in Respondent's yard were not kept clean (S.F. 47-49), and that electric lantern batteries, rocks, and objects as big as his two fists, bolts, chunks of wood, and pieces of brake shoes were all to be found in this area and that the crossing in question was not kept free of debris; that on the occasion of his accident he had stumbled over an object (S.F. 262); that there were mounds of dirt appearing in the area in question (S.F. 278), as well as dirt and "stuff" along the track in the area in question as well as other rough terrain (S.F. 339, 340, 353). A witness Respondent offered testified that there was rubbish in the yard and things in between the tracks that made it dangerous for switchmen getting on and off cars (S.F. 518), that electric lantern batteries were located all over the yard between the tracks and in between the aisles for long periods of time without any effort to clean them up, and that these objects have a tendency to roll or give if one steps upon them (S.F. 874). Graphic evidence of the portion of the railroad yard in question was exhibited to the jury in the form of photographs by way of Plaintiff's Exhibits 57 and 58, (S.F. 1307) and Defendant's Exhibit (S.F. 1325). Petitioner testified he got off at the cleanest place (S.F. 307), but that the place where he got off was nevertheless not clean (S.F. 316). Another witness

for Respondent, F. R. McBee, stated the area in question was a, "bad place", and that, "chatt and stuff", had been hauled in to try to fill it up (S.F. 987). Another witness, C. L. Roland, testified that piles of dirt and chatt and gravel existed in the area (S.F. 1225); that this condition had existed for four years prior to the date in question (S.F. 1225); that unsafe footing was provided in this area (S.F. 1226), because of a mound of dirt in the area in question (S.F. 1230). Witness A. M. Davis testified he himself had made complaints about the conditions in Ray Yard in the area of the hump where Petitioner alighted. (S.F. 1255).

## MANNER OF RAISING FEDERAL QUESTIONS IN STATE COURTS

Following the rendition of Judgment by the Court of Civil Appeals, Petitioner timely filed his Motion for Rehearing, assigning the following Points of Error:

### "POINT OF ERROR NO. 1

**"The Court erred in holding the jury's answer of "No" to Special Issue No. 2, inquiring whether Appellant failed to furnish Appellee a reasonably safe place in which to work, was equivalent and tantamount to a finding that Appellant did furnish Appellee a reasonably safe place in which to work.**

**"POINT OF ERROR NO. 2**

**"The Court erred in holding that the answer of the jury to Special Issue No. 9, convicting Defendant of negligence in permitting either chatt, gravel, rocks, mounds of dirt, or debris to remain in the area of the hump where Appellee alighted from the caboose, based upon the finding of the jury in answer to the primary issue, Special Issue No. 8, was in fatal and irreconcilable conflict with the answer of "No" to the jury of Special Issue No. 2 inquiring whether Appellant failed to furnish Appellee a reasonably safe place in which to work.**

**"POINT OF ERROR NO. 3**

**"If the answer of the jury to Special Issues Nos. 8 and 9 were in conflict to the answer of jury to Special Issue No. 2, the Court nevertheless erred in reversing this case, and in failing to give effect to the specific finding of negligence by the jury in answer to Special Issues Nos. 8 and 9, because this Court cannot, under the guise of State Procedure, defeat substantive rights granted Appellee by Congress under the Federal Employers Liability Act.**

**"POINT OF ERROR NO. 4**

**"The Court erred in failing to harmonize and reconcile the jury's finding in answer to Special Issues Nos. 8 and 9, and No. 2, in that viewing all of the evidence, answers of the jury to said issues were consistent and should have been resolved that way.**

**"POINT OF ERROR NO. 5**

**"The Court erred in reversing this case and in failing to give effect to a finding of negligence based upon the jury's answers to Special Issues Nos. 8 and 9 which inquired about a specific act of negligence and in holding there was a conflict between the answers of the jury to such issues and Special Issue No. 2, because these specific findings of negligence should prevail over a general finding in answer to Special Issue No. 2."**

Following rendition of judgment overruling Petitioner's Motion for Rehearing, the Court of Civil Appeals rendered its Opinion on Motion for Rehearing, in which Justice Williams dissented (Appendix A, p. 58), and Petitioner filed his Second Motion For Rehearing, urging the same Assignments of Error, plus the following:

**"POINT OF ERROR NO. 6**

**"The Court erred in holding that an irreconcilable conflict was created due to the fact that Appellee was able to show negligence on the part of Appellant and his employees in permitting debris to accumulate, but failed to show that Appellant and his employees were negligent in failing to furnish him a reasonably safe place to work, based upon the instruction accompanying Special Issue No. 2."**

After the Court of Civil Appeals overruled Petitioner's Second Motion for Rehearing, Petitioner then applied for

a Writ of Error to the Supreme Court of Texas, urging the following points:

"POINTS OF ERROR

"FIRST POINT OF ERROR: The Court of Civil Appeals erred in holding that the affirmative answer of the jury to Special Issue No. 9 convicting Respondent of negligence in permitting either chatt, gravel, rocks, mounds of dirt, or debris to remain in the area of the hump where Petitioner alighted from the caboose was in fatal and irreconcilable conflict with the jury's answer of 'No' to Special Issue No. 2, inquiring whether Respondent failed to furnish Petitioner a reasonably safe place in which to work.

"SECOND POINT OF ERROR: The Court of Civil Appeals erred in holding the jury's answer of 'No' to Special Issue No. 2, inquiring whether Respondent failed to furnish Petitioner a reasonably safe place in which to work, was equivalent and tantamount to a finding that Respondent did furnish Petitioner a reasonably safe place in which to work.

"THIRD POINT OF ERROR: The Court of Civil Appeals erred in reversing this case and in failing to give effect to specific findings of negligence evidenced by the answers to Special Issues Nos. 8, 9, and 10, because these specific findings of negligence should prevail over a general finding in answer to Special Issue No. 2.

**"FOURTH POINT OF ERROR: The Court of Civil Appeals erred in failing to harmonize and reconcile the jury's findings in answer to Special Issues Nos. 8 and 9, and Special Issue No. 2, in that hearing all the evidence the answers of the jury to said Issues were consistent and should have been resolved that way.**

**"FIFTH POINT OF ERROR: The Court of Civil Appeals erred in reversing this case based on the conflict in the answers to Special Issue No. 9 and Special Issue No. 2, and in failing to give effect to the specific finding of negligence in response to Special Issue Nos. 8, 9, and 10 because this defeats substantive rights granted Petitioner by Congress under the Federal Employers Liability Act.**

**"SIXTH POINT OF ERROR: The Court of Civil Appeals erred in holding that an irreconcilable conflict was created due to the fact that Petitioner was able to show negligence on the part of Respondent and its employees in permitting debris to accumulate, but failed to show that Respondent and his employees were negligent in failing to furnish him a reasonably safe place in which to work, based upon the instruction accompanying Special Issue No. 2."**

The Supreme Court of Texas refused Petitioner's Application for Writ of Error, no reversible error (Appendix A, p. 70); Petitioner filed a Motion for Rehearing which again brought to the attention of the Supreme Court of Texas the Points of Error set out above. The Supreme Court of Texas

overruled Petitioner's Motion for Rehearing on his Application for Writ of Error. (Appendix A, p. 71)

## REASONS FOR GRANTING THE WRIT

### A. The Writ Should Be Granted Because The Texas Court Has Utilized A Procedural Rule to Deny Petitioner's Recovery Under The Federal Employers Liability Act Because of An Erroneous Interpretation of Arnold v. Panhandle & Santa Fe Railway Co., 1 L. Ed. 2d 889, 353 U.S. 360, 77 Sup. Ct. 840.

The Court of Civil Appeals reversed the Judgment of the Trial Court in favor of Petitioner solely on the basis that the jury's answer of "No" to Special Issue No. 2, inquiring if Respondent failed to furnish Petitioner a reasonably safe-place-to-work, fatally conflicted with the jury's answer of "Yes" to Special Issue No. 9, inquiring whether the act of Respondent in permitting chatt, gravel, rock, mounds of dirt, or debris to remain in the area where Petitioner was injured while alighting was negligence, because this Court in *Arnold v. Panhandle & Santa Fe Ry. Co.*, supra, supposedly held that, "the unsafe-place-to-work finding was exhaustive and all-encompassing." The Court of Civil Appeals reasoned that if the unsafe-place-to-work finding in *Arnold* was exhaustive and all-encompassing, [which incidentally this Honorable Court did not hold], the jury's answer to Special Issue No. 2 was therefore tantamount to a "safe-place-to-work finding", concluding, "The *Arnold* case is really authority for holding that the answers here are in conflict." (Appendix A, p. 53) The impact of the *Arnold* decision on this case is ap-

parent; a careful examination of *Arnold v. Panhandle & Santa Fe Ry. Co.*, supra, is vitally necessary because, with reference to the jury's findings, the instant case is precisely the converse of *Arnold v. Panhandle*, supra. In *Arnold v. Panhandle*, supra, a jury acquitted the Railroad of eight specific acts of negligence, but found that the Railroad failed to furnish Arnold a reasonably safe place in which to work. Here, the jury has acquitted the Railroad of negligence in failing to furnish a reasonably safe place in which to work, which is not tantamount to a, "safe-place-to-work finding", as the Court of Civil Appeals reasoned; however the jury did find that the Railroad was guilty of a specific act of negligence, i.e., permitting debris to remain in the particular area where Petitioner was injured.

In spite of Arnold having shown himself entitled to recovery under the Federal Employers Liability Act by securing an affirmative jury finding that the railroad failed to furnish him a safe place in which to work, which act was negligence causing his injuries, the Texas Court of Civil Appeals in *Panhandle & Santa Fe Ry. Co. v. H. T. Arnold*, 283 S.W. 2d 303 (Amarillo Civ. App. 1955), denied recovery, holding that in view of the jury's acquittal of the railroad of any specific act of negligence, a conflict in the findings was present. The Texas Court of Civil Appeals, at 283 S.W. 2d 305, said:

> "The law of this State is well established that the courts must reconcile any apparent conflict in the jury answers

> if the same can be reasonably done in the light of the facts of the particular case. A general finding that appellant failed to furnish appellee with a safe place to work cannot stand in the face of the specific findings of the jury exonerating both appellant railway and Billings of any negligence proximately causing appellee's injuries. Walker v. Houston Electric Co., Tex. Civ. App. 155 S.W. 2d 973, writ of error ref.; Aranda v. Texas & N.O. R. Co., Tex. Civ. App. 140 S.W. 2d 236; Sproles v. Rosen, 126 Tex. 51, 84 S.W. 2d 1001; El Paso Electric Co. v. Hedrick, Tex. Com. App., 60 S.W. 2d 761; Harbin v. City of Beaumont, supra."

This Honorable Court granted certiorari, and in *Arnold v. Panhandle & Santa Fe RR. Co.*, 353 U.S. 360, 1 L. Ed. 2d 889, 77 Sup. Ct. 840, reversed and remanded the decision of the Texas Court of Civil Appeals, and held:

> "But even if the rule announced by the Court of Civil Appeals controlled, as we see it these answers present no square conflict. The findings on these special issues do not exhaust all of the possible grounds on which the prior unsafe-place-to-work finding of the jury may have been based. Hence all of the findings in this case might well be true insofar as the record indicates. The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for '* * * the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Davis v. Wechsler, 263 U.S. 22, 24, 68 L. Ed. 143, 145, 44 S. Ct. 13. See Dice v. Akron, C. & Y.R. Co., 342 U.S. 359, 96 L. Ed. 398, 72 S. Ct. 312; Brown v. Western R. Co. 338 U.S. 294, 94 L. Ed. 100, 700 S. Ct. 105. The judgment of the Court of Civil Appeals is reversed and the case is remanded."

It is obvious that the Court of Civil Appeals in the instant case has made two erroneous inferences based upon the language of this Honorable Court set out above: First, the Court of Civil Appeals in its opinion erroneously stated that the United States Supreme Court held that "the unsafe-place-to-work finding was exhaustive and all-encompassing." Petitioner asserts this Honorable Court merely stated that the *specific acts of negligence themselves were not exhaustive and all-encompassing*, and that other specific acts of negligence could reasonably and conceivably have been included within the general unsafe-place-to-work finding. This Court did not expressly or impliedly hold that the reasonably safe-place-to-work finding was exhaustive or all-encompassing. Second, it reasonably follows that the Court of Civil Appeals here has erroneously misconstrued this Honorable Court's language in stating: "The *Arnold* case is really authority for holding that the answers here are in conflict." The *Arnold* decision makes it unmistakably clear that this Court's rationale and intention was to reconcile and harmonize a jury verdict and to prevent the existence of conflicting findings in order to effectuate the liberal policies underlying administration of the Federal Employers Liability Act through our Courts, whether State or Federal. This Honorable Court surely did not intend, and had no reason to anticipate, that its language would be utilized to *create* a conflict in jury findings such as in the instant case, so as to nullify a railroad worker's right to recovery clearly established by means of an affirmative jury finding of a specific act of negligence on the part of his employer.

We submit that the employer in a Federal Employers Liability Act case can commit specific acts of negligence which are not encompassed within the general unsafe-place-to-work concept. *If the Court of Civil Appeals be correct in its holding in this case, then this Court has in effect held that an injured workman in an action brought under the Federal Employers Liability Act against his employer will only be entitled to submit and ask the jury the question: "Did the employer fail to furnish him a reasonably safe place in which to work?"* Reasoning further, if the Court of Civil Appeals be correct in its opinion, should a jury answer the safe-place-to-work issue affirmatively, and answer the issues on specific acts of negligence in the negative, then the workman would be entitled to recovery under the authority of *Arnold*, supra; should the jury answer the general safe-place-to-work issue negatively, then recovery would automatically be denied, because this concept is exhaustive and all-encompassing. Surely this unjust result and unduly restrictive interpretation is far too narrow and is violative of the liberal purposes intended by the Act, and not in harmony with this Court's intent and rationale in *Arnold v. Panhandle & Santa Fe Ry. Co.*, supra.

Associate Justice Claude Williams, in his dissent below, recognizes that when correctly applied to the facts of the case at bar, *Arnold v. Panhandle*, supra, compels the opposite holding than that made by the majority of the Court of Civil Appeals. (Appendix A, p. 64) He correctly reasons that Petitioner in this case has plainly and reasonably asserted and established a Federal right by securing affirmative jury findings that Respondent negligently permitted debris to

accumulate in one particular area which caused his injuries, which findings, when standing alone, entitle Petitioner to recover under the Act. When the proof reaches this point, our United States Supreme Court has consistently held, "* * * the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice," *Arnold v. Panhandle & Santa Fe Ry. Co.*, supra, and *Davis v. Wechsler*, supra; it is inequitable to deny recovery simply because Petitioner did not discharge his burden of proof on a separate theory of recovery. This failure to preponderate the evidence and resulting negative jury answer did not affirmatively establish or compel the conclusion of "a safe-place-to-work".

The Court of Civil Appeals has attempted to sidestep this Court's holdings by erroneously maintaining that no rules of local practice are involved herein, but only questions as to the substantive rights of the parties. This position is wholly untenable in view of this Court's approach in *Arnold v. Panhandle & Santa Fe*, supra, decided upon the identical type of Special Issues peculiar to Texas practice.

**B. The Writ Should Be Granted Because The Texas Court Has Denied Petitioner's Right to Recovery Under The Federal Employers Liability Act By Refusing To Reconcile The Jury Verdict On Any One Of Several Reasonable Grounds, Having The Duty To Do So Under Both State And Federal Law.**

It is apparent upon reading Petitioner's POINTS OF ERROR, utilized below pursuant to Texas appellate prac-

tice to preserve error, that Petitioner has consistently and tenaciously pointed out to the Texas Courts several reasonable and cogent grounds upon which the jury's verdict here could have been harmonized and reconciled. This was the Court's duty under Texas practice. This Court so held in *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108, 9 L. Ed. 2d 618, 83 Sup. Ct. 659; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 7 L. Ed. 2d 798, 807, 82 S. Ct. 1134; *Arnold v. Panhandle & S.F. R. Co.*, 353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct., 840; also see *McVey v. Phillips Petroleum Co.*, 228 F. 2d 53 (C.A. 5th Cir.); *Morris v. Pennsylvania Ry.*, 187 Fed. 837 (C.A. 2d Cir.). The Texas Courts below have declined to so reconcile and harmonize the jury verdict in the instant case, which in itself amounts to a denial of Petitioner's substantive rights under the Federal Employers Liability Act because such refusal in effect obliterates positive affirmative jury findings that Respondent's specific act of negligence caused Petitioner's injuries, and therefore eradicates federal rights plainly and reasonably established.

1. *Effect of The Gallick Case*

In *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108, 9 L. Ed. 2d 618, 83 Sup. Ct. 659, a railroad employee brought suit against his employer under the Federal Employers Liability Act in the Ohio State Courts, alleging injuries sustained as a result of being bitten by an insect while working on the railroad premises. Under the Ohio state practice, rather than submitting the case upon a general verdict,

the Court submitted twenty three numbered Interrogatories to the jury, analogous to Special Issues in Texas. In answer to these Interrogatories, the jury found: (1) Petitioner was bitten by an insect; (2) the insect bite caused illness or disease; (3) a stagnant pool attracted such insects and was responsible for the insect bite and injuries to Petitioner; (4) Respondent knew that the accumulation of the pool of water would attract bugs to the area; and (5) there was a proximate causal relationship between the stagnant pool, the insect bite, and the foreman's injuries, which findings standing alone, clearly and plainly would have entitled the employee to redress under the Act. However, the jury also found *there was no reason for the railroad to anticipate that maintaining the stagnant pool would or might probably result in a mishap or injury*. The Ohio Common Pleas Court entered Judgment awarding damages to the employee, but the Ohio Court of Appeals reversed on the basis that there was insufficient evidence to warrant the jury's conclusion that the railroad's actions caused the employee's injuries. Certiorari was granted, and the Respondent railroad argued before this Court that because the jury had answered, "No", to an interrogatory inquiring if there was any reason for the railroad to anticipate that maintenance of the stagnant infested pool would probably result in a mishap or injury, and had then answered, "Yes", to an interrogatory inquiring whether there existed a proximate causal relationship between the stagnant water, the insect bite, and the employee's injuries, a fatal inconsistency and conflict existed among the jury's findings which cancelled each other and necessitated a

new trial, arguing that one amounted to a finding of foreseeability and the other interrogatory amounted to a finding of no foreseeability. In answer to these contentions, this Honorable Court, at 9 L. Ed. 2d 627, held:

> "In the first place, the jury *might not have equated* a foreseeable insect bite with a mishap or injury. The trial judge more than once in his instructions separated an 'insect bite' from 'injury', 'infection', 'illness' or 'disease'. The answer to question 20 thus *might mean simply that* while an insect bite was foreseeable, there was no reason to anticipate a 'mishap' or 'injury' from such a bite * * * It is widely held that for a defendant to be liable for consequential damages need not foresee the particular consequences of his negligent acts: * * *" (Emphasis ours)

> "But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case it makes the jury's answers to special interrogatories consistent, they must be resolved that way'. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd. 369 U.S. 355, 364, 7 L. Ed. 2d 798, 807, 82 S. Ct. 1134. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in Arnold v. Panhandle & S.F. R. Co., 353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct., 840; McVey v. Phillips Petroleum Co., 228 F. 2d 53 (C.A. 5th Cir.); Morris v. Pennsylvania Ry., 187 Fed. 837 (C.A. 2nd Cir.) collecting authorities, before we are free to disregard the jury's special verdict and remand the case for a new trial."

> "We do not believe that the conclusion of fatal inconsistency is compelled by these findings * * * *The answers to these two interrogatories are therefore not controlling for Federal Employers Liability Act purposes.*" (Emphasis ours)

This Court, in *Gallick*, supra, logically and soundly reasoned what the jury *might or might not have thought, and what the answers to the interrogatories might or might not have meant, in an effort to reconcile that jury verdict.* This decision, in accord with earlier Texas cases cited, clearly indicates the Texas Court's duty to reconcile and harmonize a jury verdict such as this one, and *Gallick* further demonstrates that this Court will not allow positive affirmative findings of negligence and causation entitling a railroad employee to recovery under the Act to be abrogated in the absence of unresolvably compelling reasons. The Texas Court failed to follow the mandate of this Court in *Gallick*, supra, which quoted the following language from *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 88 L. Ed. 520, 64 Sup. Ct. 409:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury."

The principle just set out above applies with equal force to jury findings and the conclusions to be drawn therefrom by our Courts, and therefore the Court of Civil Appeals was not warranted in searching the instruction accompanying Special Issue No. 2 and drawing inferences therefrom as to what the Jury might or must have decided in support of the Court's previous conclusion that a conflict existed. (Appendix A, p. 61).

Under the Texas decisions, even in the absence of the added responsibility of effectuating the intents and purposes of Congress under the Federal Employers Liability Act, our State Courts are always under a duty to construe verdicts, if possible, as not being irreconcilably conflicting; when the findings admit of more than one reasonable construction, our Courts are under a duty to apply the construction under which there is no conflict. Jury findings are not mutually destructive if there is any reasonable explanation of the apparent conflict. *Bragg, et al v. Hughes*, 53 S.W. 151 (Texas Civ. App. 1932), no writ history; *Ford v. Carpenter*, 216 S.W. 2d 558 (Sup. Ct. of Tex. 1949); *Texas & Pacific R. Co. v. Snider*, 321 S.W. 2d 280 (Sup. Ct. of Texas 1959); *Ft. Worth & Denver R. Co. v. Britton*, 310 S.W. 2d 654 (Tex. Civ. App. 1958), writ refused n.r.e.. Our Texas Courts are under the further duty of assuming at least the ordinary intelligence of jurors, and that they never intend their specific findings should be destroyed by general findings seemingly in conflict therewith, and that such jurors do not intend to return conflicting answers. *Pruitt v. General Insurance Corp.*, 265 S.W. 2d 908 (Tex. Civ. App. 1954), writ refused n.r.e.; *Kansas City R. Co. v. Flowers* (Tex. Civ. App. 1954), writ refused n.r.e..

In spite of these Texas authorities, and in spite of the import of the *Gallick* case, supra, the Court of Civil Appeals has denied Petitioner his right of recovery under the Federal Employers Liability Act by refusing to reconcile this jury's

verdict on any of the grounds which we urge this Court to consider:

2. *Specific Findings Control General Findings*

It is apparent that Special Issue No. 2 was a general inquiry, that is, whether in general Respondent failed to furnish Petitioner a reasonably safe place in which to work; likewise, the Jury's answer thereto constitutes a general finding. Special Issue No. 9, and its corollary issues, inquired as to a specific act of negligence, that is, whether Respondent was negligent in permitting debris to remain in the specific area where Petitioner was injured; likewise, the jury's answer thereto constitutes a specific finding. The prevailing Texas Procedural Rule, and that followed long before *Arnold v. Panhandle*, supra, is that a Court, in order to avoid finding a conflict between jury findings *should give controlling effect to specific findings over general findings. Ft. Worth & Denver Ry. Co. v. Britton*, 310 S.W. 2d 654, (Tex. Civ. App. 1958), writ refused n.r.e.; *Harbin v. City of Beaumont*, 146 S.W. 2d 297 (Tex. Civ. App. 1940), no writ hist.; *Bragg, et al v. Hughes*, 53 S.W. 2d 151 (Tex. Civ. App. 1932), no writ hist.; *Ford v. Carpenter*, 216 S.W. 2d 558 (Sup. Ct. of Tex. 1949); *Panhandle & Santa Fe R. Co. v. Arnold*, 283 S.W. 2d 303, rev. 353 U.S. 360, 1 L. Ed. 889, 77 Sup. Ct. 840. Associate Justice Claude Williams, in his dissent, recognized that the apparent conflict present in this case could be readily and easily disposed of by application of this well established Texas procedural rule. (Appendix A, p. 67) As previously discussed, although this Court in *Arnold v. Panhandle*, supra, held that the application of

the rule set out above, to the effect that specific findings control general findings, may not be utilized so as to create a conflict in a jury verdict in an action brought under the Federal Employers Liability Act, thereby nullifying other positive findings and denying an employee federal rights made and asserted, *that decision certainly does not compel a State Court to refrain from utilizing such rule in order to prevent such a conflict and to reconcile and harmonize a jury verdict.* There is absolutely no good and sufficient reason for the Court of Civil Appeals to refuse to apply this applicable rule of law so as to grant Petitioner his substantive Federal rights clearly and plainly asserted without resort to further reasoning or analysis of any sort. The Court of Civil Appeals has refused to reconcile this jury verdict by reasonable application of this rule, denying Petitioner his proven right to recovery under the Federal Employers Liability Act.

3. *Effect of Negative Answer to Negatively Submitted Issue*

Under applicable Texas decisions, the technical form of Special Issue No. 2, and the effect of the jury's negative answer thereto, is of vital importance in this case. This issue was submitted to the jury in a negative form, that is, "Did Defendant *fail* to furnish a reasonably safe place in which to work?" When this negative form of submission is used, as in the instant case, a simple answer of "No" thereto simply indicates a failure on the part of the party having the burden of proof to preponderate the evidence or to discharge his burden of proof upon that issue, under Texas

law. By negative submission, Petitioner means framing a question or issue so as to inquire if one "failed" to perform an act or "did not" perform an act; both phrases are synonymous, and both amount to a negative submission. There might be a distinction here had the jury been required by the Court to make positive findings either way, such as, "Answer they did fail, or, they did not fail," or had some similarly revealing response been required and given by the jury. The jury simply answered Special Issue No. 2, "No". As a matter of law, under the following Texas authorities, such a simple answer of, "No", given in answer to Special Issue No. 2, cannot be said to be equivalent to a converse affirmative finding against Petitioner, that is, *Respondent did furnish him a reasonably safe place in which to work, or that its agents and employees used ordinary care. Hill v. Leschber*, 235 S.W. 2d 236 (Texas Civ. App. 1950), no writ history; *Gulf State Utilities v. Grubbs*, 44 S.W. 2d 1001 (Tex. Civ. App. 1932), no writ history; *Halliburton Oil Well Cementing Co. v. Groves*, 308 S.W. 2d 919 (Tex. Civ. App. 1957), writ refused, n.r.e.. This rule of law, which can be confusing, is most clearly illustrated in 41-B Texas Jurisprudence, p. 780, Form and Sufficiency of Answers:

> "Thus where the jury are asked "Do you find from a preponderance of the evidence that this condition did not exist etc., Answer 'yes' or 'no,'" the issue as so framed is calculated to confuse; the answer "no" does not indicate that the jury affirmatively find that the condition existed, but merely that the party having the burden of proof did not establish the nonexistence of the condition. A better practice is for the court, in the main charge, to instruct the jury to give such answers

as "This condition did not exist," or "This condition did exist."

This rule has typically been applied by our Texas Courts in automobile accident cases where there is an affirmative jury finding as to speed, and a negative jury finding in response to an issue inquiring if a party *failed* to keep his automobile under proper control, a general negative submission. This application is best illustrated in cases such as *Fortune v. Swap Shop*, 352 S.W. 2d 148 (Tex. Civ. App. 1961), reversed on other grounds, 365 S.W. 2d 151 (Sup. Ct. of Tex. 1963), where the Court held:

> "Irreconcilable conflict between affirmative findings as to speed, and a negative finding on the issue of failure of decedent to keep his automobile under proper control is asserted. It is held there is no irreconcilable conflict."

Another application of this principle is found in *Kimble v. Younger Bros.*, 283 S.W. 2d 254 (Tex. Civ. App. 1955), writ ref. n.r.e., where the Court stated:

> "Such contentions made by appellant are not the law in Texas. On the other hand, it has been clearly and consistently held that a failure to find that there has been improper control of a vehicle does not conflict with, nor override, a specific finding of some act of omission or commission which might, in the broad sense, be considered to constitute one of the elements of proper control of a vehicle."

What is the effect and impact of this rule upon this case? It prevents the existence of a conflict between the findings of the jury given in response to Special Issue No. 2 and those given in response to Special Issues Nos. 8, 9, and 10,

because Petitioner has simply failed to discharge his burden of proof and to preponderate the evidence in one instance, but has secured affirmative jury findings as to a specific act of negligence in another instance. There is no fatal conflict in these findings; there is no, "safe-place-to-work finding". (Appendix A, p. 52) Before one can correctly state that Respondent affirmatively furnished Petitioner a reasonably safe place in which to work there must be an *affirmative jury finding* to that effect; the simple answer of "No" will not furnish that affirmative finding, regardless of how it may appear at first blush, because it does not reflect a unanimous vote of twelve jurors to establish that fact.

The Court of Civil Appeals has thus refused to accept this second reasonable basis upon which to reconcile any conflicting jury findings, denying Petitioner his proven right to recovery under the Federal Employers Liability Act.

4. *Reasonable Explanation of The Jury Verdict*

Although, as previously pointed out, the Jury's answer of, "No", in response to Special Issue No. 2 does not amount to an affirmative finding against Petitioner that Respondent did furnish him a reasonably safe place in which to work, or that Respondent's employees did use ordinary care, even if one were to assume arguendo that Respondent did furnish Petitioner a reasonably safe place in which to work, *there would be no irreconcilable conflict between the findings in response to these issues. The inquiry with respect to furnishing a reasonably safe place in which to work could very reasonably have been answered by the Jury based upon testimony and evidence covering the condition of the entire Ray Yard in Denison, Texas, an area of a considerable*

*number of acres, because this issue was not limited nor localized to any particular area.* By way of contrast however, Special Issue No. 9 inquired of the Jury whether Respondent permitted debris to accumulate, "in the area of the hump", *where Petitioner alighted from the railroad car* and was injured. Thus, Special Issue No. 9 had reference only to that one particular area where Petitioner was injured, which is only a small fractional part of the entire railroad yard. *The Jury could easily have believed that the railroad yard in general constituted a "reasonably safe place in which to work," but that Respondent was negligent in permitting foreign substances to remain in the area at the "hump".*

The Jury had evidence with respect to the yard generally and heard evidence also with respect to the specific area of the "hump"; Petitioner testified that although he got off at the cleanest place in the yard, this particular area was not free of debris (S.F. 307, 316); that the aisles and passageways in and around the tracks of the railroad yard in general were not kept clean (S.F. 47-49); and that there were rocks and batteries in that general area (S.F. 433-434). Numerous exhibits were introduced depicting large portions are areas of the railroad yard (S.F. 278, 353, 1307, 1325). One of Respondent's own witnesses testified to rubbish and things in between the tracks in the yard generally which made it dangerous in his opinion for switchmen getting on and off cars in the railroad yard generally (S.F. 518); that electric lantern batteries were located between the tracks and in between the aisles all over the railroad yard (S.F.

874). Another witness, C. L. Roland testified that the conditions in general in the railroad yard in Denison, Texas, had brought about a threat to strike (S.F. 1228). Another witness, A. M. Davis, testified that he himself had complained about conditions in the yard generally, as well as the particular area where Petitioner was injured (S.F. 1255).

One would further have to assume that the answer to Special Issue No. 2 not only amounts to an affirmative finding that Respondent furnished Petitioner a reasonably safe place in which to work, but also that such affirmative finding further means that Respondent furnished Petitioner an *absolutely* safe place in which to work as to the *entire* railroad yard in order for a conflict to be produced. Of course the proper concept contemplated by the Federal Employers Liability Act, Title 45 U.S.C. Sec. 51, is that of a reasonably safe place in which to work, *not an absolutely safe place in which to work. B & O Southwestern Railway Co. v. Carroll*, 280 U.S. 491, 74 L. Ed. 566, 50 Sup. Ct. 182.

The Court of Civil Appeals also based its opinion, partially at least, upon the instruction accompanying Special Issue No. 2, wherein the Jury was instructed that the reasonably safe place to work concept had reference not only to the physical condition of the premises themselves, but also the negligent acts of fellow employees. (Appendix A, p. 61) Under the authorities previously cited, the Jury's answer of, "No", to Special Issue No. 2 cannot be converted into a converse affirmative finding that Respondent's employees used ordinary care. Therefore the jury could easily have answered Special Issue No. 2 on the basis that Respondent's employees did not by their own negligent acts

convert the railroad yard into an unsafe place to work, and may not even have considered the physical condition of the premises, which would have been entirely permissible under the instruction given. Since a railroad may furnish his employees an unsafe place to work not only by its maintenance of the physical condition of the premises itself, but also by the negligent acts of its employees, this is a plausible explanation of what the jury might have been thinking in answering Special Issue No. 2, "No". This explanation would be far more plausible than that adopted by the Court of Civil Appeals in view of the fact that the jury exonerated Respondent's employees of any act of negligence relating to the signals given and movements of the trains in question in response to the numerous other Special Issues submitted by Petitioner in this case.

It is obvious that the jury verdict in this case could have been reasonably reconciled so as to avoid any conflict in findings, purely upon a reasonable explanation of what the jury reasonably could have considered in answering these Issues, that is, the jury might reasonably have answered Special Issue No. 2, inquiring if Respondent failed to furnish Petitioner a reasonably safe place in which to work, which issue was unlimited as to any one particular area or locale, on the basis of the condition of the entire railroad yard consisting of a number of acres, and then answered Special Issue No. 9 on the basis of one specific and particular area of the entire railroad yard. Presuming the ordinary intelligence and honesty of these twelve jurors, and presuming further that they did not intend their answers to be con-

flicting, this explanation furnishes a reasonable basis to reconcile and harmonize this jury verdict.

The Court of Civil Appeals refused to reconcile and harmonize the jury verdict on the basis of this plausible explanation, and has therefore denied Petitioner his established right to recovery under the Federal Employers Liability Act.

## CONCLUSION

The Judgment and Opinion of the Court of Civil Appeals deprives Petitioner his established right of recovery under the Federal Employers Liability Act, is based upon an erroneous interpretation of prior decisions of this Honorable Court, and demonstrates a refusel to reconcile and harmonize a jury verdict on several reasonable grounds, in the face of the duty placed upon it to do so by prior decisions of Texas Courts and this Honorable Court in an effort to effectuate the intents and purposes of the Federal Employers Liability Act. For these reasons and those previously advanced, and in view of the important substantive questions presented, this Petition for Writ of Certiorari should be granted.

## PRAYER

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted in order for this Court to review the Record, Opinion and Final Judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas, and on final hearing, this case be remanded to such Court instructing it to render Judgment affirming the Judgment of the Trial Court, with all costs taxed against Respondent,

and Petitioner further prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

CHARLES GULLETT,
Citizens National Bank Bldg.,
Denison, Texas,

ROBERT DOSS,
Citizens National Bank Bldg.,
Denison, Texas,

BAKER, JORDAN, SHAW & FOREMAN,
1610 Tower Petroleum Bldg.,
Dallas, Texas,

By: Russell M. Baker
*Attorneys for Petitioner.*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas has been furnished to Messrs. Wm. A. Thie, Katy Bldg., 701 Commerce, Dallas, Texas, and Ralph Elliott, Sherman Savings & Loan Bldg., Sherman, Texas, Attorneys for Respondent, by placing same in the United States Mail, postage prepaid, properly addressed, certified mail, return receipt requested on this the 2 day of June, 1965.

Russell M. Baker
RUSSELL M. BAKER

# APPENDIX A

## I. Opinions, Judgments, and Orders of Courts below:

### A. *Judgment of the District Court of Grayson County:*

**No. 68,484**

H. T. SHELTON

*v.*

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

IN THE DISTRICT COURT OF
GRAYSON COUNTY, TEXAS
15TH JUDICIAL DISTRICT

On the 25th day of February, 1963, the above entitled and numbered cause having come on to be heard, appeared the Plaintiff in person and by his attorneys, and the Defendant, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, appearing through its attorney, and all parties announced ready for trial. Thereupon came a jury of twelve good and lawful men and women of Grayson County, Texas, composed of H. K. Kirby and eleven others, who being duly sworn and empanelled, and who, having heard the pleadings, evidence, and argument of Counsel, retired to consider their verdict, and who afterward returned into open court, on the 9th day of March, 1963, their verdict in response to Special Issues submitted to them by the court, which verdict having duly been considered by the court was in all things approved and ordered filed as the verdict in said

cause. Said verdict is in words and figures substantially as follows:

SPECIAL ISSUE NO. 1:

"Do you find from a preponderance of the evidence that on or about the 22nd day of April, 1962, and on the occasion in question, H. T. Shelton sustained an injury (as defined herein)?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 2:

"Do you find from a preponderance of the evidence that on the occasion in question defendant failed to furnish plaintiff a reasonable safe place in which to work?

"ANSWER: "No."

SPECIAL ISSUE NO. 5:

"Do you find from a preponderance of the evidence that the fireman in charge of defendant's eastbound engine, on the north running track failed to keep a proper lookout (as defined herein)?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 6:

"Do you find from a preponderance of the evidence that such failure, if any, you have found in answer to the preceding special issue was negligence, as defined herein?

"ANSWER: "No."

SPECIAL ISSUE NO. 8:

"Do you find from a preponderance of the evidence that Defendant permitted either chatt, gravel, rocks,

mounds of dirt, or debris to remain in the area of the hump where Plaintiff alighted from said caboose.

"ANSWER: "Yes."

SPECIAL ISSUE NO. 9:

"Do you find from a preponderance of the evidence that such act in permitting either chatt, gravel, rocks, mounds of dirt, or debris to remain in the area of the hump where Plaintiff alighted from said caboose, if you have so found in answer to the preceding special issue, was negligence, as defined herein?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 10:

"Do you find from a preponderance of the evidence that plaintiff's injuries, if any, resulted in whole or in part from such negligence, if any, you have found in answer to the preceding special issue?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 11:

"Do you find from a preponderance of the evidence that the failure of defendant railroad company to require the train crew to place the standard caboose at the rear end of the train was negligence, as defined herein?

"ANSWER: "No."

SPECIAL ISSUE NO. 12A

"Do you find from a preponderance of the evidence that on the occasion in question Plaintiff was struck by Defendant's eastbound engine moving eastward on the North running track?

"ANSWER: "No."

SPECIAL ISSUE NO. 15:

"Do you find from a preponderance of the evidence that the engine crew on defendant's eastbound engine on the north running track moved said engine eastward at a time when plaintiff was in the act of alighting between the tracks?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 16:

"Do you find from a preponderance of the evidence that the act of the engine crew on defendant's eastbound engine, moving said engine eastward at a time when plaintiff was in the act of alighting between the tracks, if you have so found, in answer to the preceding special issue was negligence, as defined herein?

"ANSWER: "No."

SPECIAL ISSUE NO. 18:

"Do you find from a preponderance of the evidence that on the occasion in question, defendant failed to provide adequate lighting in the area where plaintiff was injured?

"ANSWER: "No."

SPECIAL ISSUE NO. 21:

"Do you find from a preponderance of the evidence that defendant on the occasion in question was using a caboose with bay windows extending outward from the side of the caboose so far as to make it dangerous for a man to be working between two sets of tracks when said caboose passed another train of cars on an adjoining track?

"ANSWER: "No."

SPECIAL ISSUE NO. 24:

"Do you find from a preponderance of evidence that on the occasion in question defendant permitted the doors of said caboose with bay windows to be locked so that plaintiff could not open same?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 25:

"Do you find from a preponderance of the evidence that the act of defendant in permitting the doors of said caboose to be locked if you have so found, in answer to the preceding special issue was negligence, as defined herein?

"ANSWER: "No."

SPECIAL ISSUE NO. 27:

"Do you find from a preponderance of the evidence that the engine crew of defendant's eastbound engine, on the north running track failed to give any signal of warning as said engine started to move east?

"ANSWER: "No."

SPECIAL ISSUE NO. 30:

"Do you find from a preponderance of the evidence that at the time the plaintiff H. T. Shelton was alighting from the caboose on which he was riding, the train then occupying the parallel track to the north, was in motion?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 31:

"Do you find from a preponderance of the evidence that the act of the plaintiff H. T. Shelton in alighting from the caboose on which he was riding, between the tracks upon which his train was proceeding and one

upon which there was a train movement in the opposite direction, if you have so found, was negligence, as that term has been defined to you?

"ANSWER: "No."

SPECIAL ISSUE NO. 32:

"Do you find from a preponderance of the evidence that such negligence, if any you have so found, was a proximate cause, as defined herein, of the injury, if any, claimed to have been sustained by the plaintiff on the occasion in question:

"ANSWER: "No."

SPECIAL ISSUE NO. 34:

"Do you find from a preponderance of the evidence that on the occasion in question plaintiff alighted from the moving caboose without guarding against equipment moving on other tracks, if it was, so as to place himself in a position of close clearance?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 35:

"Do you find from a preponderance of the evidence that such conduct, if any you have found in answer to the preceding special issue was negligence as that term has been defined herein?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 36:

"Do you find from a preponderance of the evidence that such negligence, if any you have so found, was a proximate cause of the injuries, if any, claimed to have been sustained by the plaintiff?

"ANSWER: "No."

SPECIAL ISSUE NO. 38:

"Do you find from a preponderance of the evidence that at the time and on the occasion in question plaintiff H. T. Shelton failed to keep a proper lookout (as that term has been defined to you) for his own safety?

"ANSWER: "No."

SPECIAL ISSUE NO. 41:

"Do you find from a preponderance of the evidence that plaintiff H. T. Shelton, at the time and on the occasion in question alighted from the caboose upon which he was then riding without guarding against the projecting window of the bay window caboose to his rear?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 42:

"Do you find from a preponderance of the evidence that such action, if any, was negligence, as that term has been defined to you?

"ANSWER: "No."

SPECIAL ISSUE NO. 45:

"Do you find from a preponderance of the evidence that at the time and on the occasion in question plaintiff voluntarily, by his own election, selected the right hand side of his caboose instead of the left hand side, in the direction the movement was then proceeding, to alight from said caboose?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 46:

"Do you find from a preponderance of the evidence that such election, if any, was negligence, as that term has been defined to you?

"ANSWER: "No."

SPECIAL ISSUE NO. 49:

"Do you find from a preponderance of the evidence that on the occasion in question plaintiff alighted from the moving caboose without guarding against unsafe footing, if it was?

"ANSWER: "No."

SPECIAL ISSUE NO. 53:

"Do you find from a preponderance of the evidence that on the occasion in question as plaintiff alighted from the moving caboose he failed to move to a place of safety upon approach of equipment moving on other tracks, if it was?

"ANSWER: "Yes."

SPECIAL ISSUE NO. 54:

"Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the preceding special issue, was negligence, as that term has been defined to you?

"ANSWER: "No."

SPECIAL ISSUE NO. 57:

"Do you find from a preponderance of the evidence that on the occasion in question plaintiff alighted between the rails on ends of ties, or on or between rails of a turnout?

"ANSWER: "No."

SPECIAL ISSUE NO. 61:

"Do you find from a preponderance of the evidence that at the time and on the occasion in question the movement upon which plaintiff H. T. Shelton was then riding constituted a yard to yard transfer of railway equipment?

"ANSWER: "No."

SPECIAL ISSUE NO. 65:

"Do you find from a preponderance of the evidence that the injuries, if any, the plaintiff H. T. Shelton sustained on the occasion here involved were not the result of an unavoidable accident?

"ANSWER: "It was not an unavoidable accident."

SPECIAL ISSUE NO. 66:

"What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence will fairly and reasonably compensate the plaintiff, H. T. Shelton, for the injuries, if any, that you believe from a preponderance of the evidence he sustained on the occasion here involved, which resulted in whole or in part from negligence, if any, found by you in this charge to have been committed by the Defendant upon said occasion?

"ANSWER: $25,000.00.

SPECIAL ISSUE NO. 67:

"What percent, if any, do you find from a preponderance of the evidence does the negligence, if any, of the plaintiff bear to the entire negligence, if any, of both the plaintiff and the defendant?

"ANSWER: 75% Plaintiff."

The court finds that Special No. 67 was voluntarily answered by the jury contrary to the instructions of the court, and the court, in view of the jury's answers in response to other issues, finds such answer is merely surplusage, and further finds that the answer thereto does not present a clear conflict with any of the answers to the issues the jury were required to make in response to the instructions of the

court and that such answer to Special Issue No. 67 should therefore be disregarded.

Under the pleadings, evidence, and verdict of the jury the court is of the opinion that Plaintiff, H. T. SHELTON, is entitled to have and recover judgment against the Defendant, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

It is therefore, ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, H. T. SHELTON, do have and recover judgment against Defendant, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, for the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), with interest thereon at the rate of six percent (6%) per annum from the date hereof, together with all costs in his behalf expended and that he have his execution.

To all of which Defendant, in open Court, duly and timely expected.

DATED, RENDERED, SIGNED AND ENTERED this the 20th day of May, 1963.

/s/ R. C. VAUGHAN

.....

*Judge*

**B. *Opinion of Court of Civil Appeals:***

**No. 16,343**

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
*Appellant,*

*v.*

H. T. SHELTON,
*Appellee.*

FROM THE DISTRICT COURT
OF
GRAYSON COUNTY, TEXAS

Missouri-Kansas-Texas Railroad Company has appealed from a judgment for $25,000 awarded to appellee H. T. Shelton, a switchman employed by appellant. The suit was brought for damages for personal injuries. Recovery was sought under the provisions of the Federal Employers Liability Act, Title 45, Sec. 51 and 53, U.S.C.A.

Appellee alleges that he sustained serious injuries while alighting from a moving train not only as a result of being struck by a caboose on the train from which he alighted but also as a result of being struck by an engine coming from an opposite direction upon an adjacent track.

Sixty-seven special issues were submitted to a jury. In answering these Issues the jury in effect acquitted appellant in all particulars except in its answers to Special Issues Nos. 8, 9, 10 and 65, which four Issues were answered as follows:

(8) Appellant permitted chatt, gravel, rocks, mounds of earth or debris to remain in the area of the hump where appellee alighted;

(9) said act was negligence;

(10) appellee's injuries resulted *in whole or in part* from such negligence;

(65) appellee's injuries were not the result of an unavoidable accident.

The jury did not find that any act of appellee contributed to cause his injuries.

Appellant's points on appeal, Nos. 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 16, 17 and 18, all involve appellant's main contention: that the court erred in requiring the jury to apply different standards to appellant than to appellee in matters of causal relationship. The court submitted issues and definitions which permitted answers favorable to appellee if the jury found that appellee's injuries resulted *in whole or in part* from appellant's negligence. But as to contributory negligence the court submitted issues and definitions which permitted answers favorable to appellant only if the jury found that appellee's injuries were *proximately caused* by his own negligence.

Appellant not only objected to the issues as submitted but objected to the court's refusal to submit requested issues and definitions which would have required the jury to apply the same standards to appellant and appellee in matters of causal relationship.

The Federal Employers Liability Act, Title 45, Sec. 51 expressly provides that every common carrier by railroad while engaged in Interstate commerce shall be liable in damages to any employee suffering injury resulting "in whole or in part" from the negligence of the railroad. This provision has been upheld in numerous decisions, Federal and State.

We quote from the opinion of the Supreme Court of the United States in Rogers v. Missouri Pacific Railroad Company, 77 S. Ct. 443, 448, 352 U.S. 500:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employees' contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due *'in whole or in part'* to its negligence. (Emphasis added.)
>
> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages of injury or

> death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

See also Dennis v. Denver & Rio Grande Western RR Co., 84 S. Ct. 291, ..... U.S. .....; Coray v. Southern Pacific Co., 69 S. Ct. 275, 335 U.S. 520; Page v. St. Louis Southwestern Ry. Co., 312 F. 2d 84; and Campbell v. C. & O. Ry. Co., (Ill.) 183 N.E. 2d 736.

There are also numerous opinions, some of them by Texas courts, in which it is held that the Federal Statute is controlling over the common-law or statute of a state. Texas & Pacific Ry. Co. v. Younger, 262 S.W. 2d 557; Rio Grande, E.P. & S.F. R. Co. v. Dupree, (Comm. App.) 55 S.W. 2d 522; and see the annotations under Note No. 54 of Title 45, Sec. 51 U.S.C.A.

Title 45, Sec. 53, U.S.C.A. expressly provides that in actions for personal injuries to an employee or for injuries resulting in death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. There are many cases upholding this provision, the latest being Dennis v. Denver & Rio Grande Rail-

road Company, *supra*. See also Wantlant v. Ill. Central RR Co. 237 F. 2d 921; Sears v. Southern Pacific Co., 313 F. 2d 498; and the numerous annotations under Notes Nos. 41-44, of Title 45, Sec. 53, U.S.C.A.

In applying this statute a definition of contributory negligence has been approved which definition includes the *proximate cause* theory as applied to the alleged contributory negligence of the employee. Chesapeake & Ohio Ry. Co. v. Richardson (1941), 116 F. 2d 860, cert. denied, 61 S. Ct. 961, 313 U.S. 574, 85 L. Ed. 1531. See also A.T. & S.F. Ry. Co. v. Seamas, 201 F. 2d 140.

We are convinced that under the Federal Statutes, Title 45, Secs. 51 and 53, U.S.C.A., it was not error for the trial court to submit issues to the jury inquiring whether appellee's injuries resulted in whole or in part from appellant's negligence. We have been impelled to this conclusion by the plain wording of the statute itself and by the interpretation put thereon by numerous judicial opinions, especially by the strong language used by the Supreme Court of the United States in Rogers v. Missouri Pacific RR. Co., *supra*, from which opinion we quoted earlier in this opinion.

We are also convinced that it was not reversible error for the court to submit the contributory negligence issues in such manner as to inquire of the jury whether appellee's negligence was, in any of the alleged instances, a *proximate cause* of his injuries. The Congress has seen fit by statute to supplant the common-law duty of railroads to employees by the more drastic duty of the "in-whole-or-in-part" causa-

tion concept. But the Congress has not seen fit by statutory enactment to change the common-law concept of proximate cause with reference to contributory negligence of the employee. And in the absence of such a statutory enactment the common-law rule must prevail. T. & N.O. R. Co. v. Railroad Commission, 220 S.W. 2d 273; Smith v. J. Weingarten, Inc., 120 S.W. 2d 878, 880; City of Corpus Christi v. Coffin, 35 S.W. 2d 202; State v. Anderson, 26 S.W. 2d 174; 15 C.J.S. 619.

The common law prevails in Texas unless Inconsistent with the Constitution and laws of the state or the United States, Art. 1, V.A.C.S. The common law prevails with reference to causal relationship in contributory negligence. It is a long established rule that the Federal Courts enforce the common law of the state in which a cause arises and is tried when such common law is not in conflict with the Constitution and statutes. Erie Railroad Co. v. Tompkins, 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487; United States v. Swierzbenski, 18 F. 2d 685; The West Jester (Wagstaff v. United States, et al), 281 F. 877; 15 C.J.S. 630.

No cases exactly in point on the issue raised by appellant have been cited to us and we have found none. But there are cases which seem to us to point in the direction of our holding in regard to the employee's liability for his own negligence under Title 45, Sec. 53, U.S.C.A. Sears v. Southern Pacific Co., 313 F. 2d 498 (Syl. 3); A. T. & S. F. Ry. Co. v. Seamas, 201 F. 2d 140. We overrule appellant's Points Nos. 1, 2, 3, 4, 8, 9, 10, 12, 13, 14, 16, 17 and 18.

In its Point No. 5 appellant says that it was error for the court to base its judgment on the jury's findings to Special Issue No. 9. The issue was submitted as follows:

> "SPECIAL ISSUE NO. 9:
>
> "Do you find from a preponderance of the evidence that such act in permitting either chatt, gravel, rocks, mounds of dirt, or debris to remain in the area of the hump where Plaintiff alighted from said caboose, if you have so found in answer to the preceding special issue, was negligence, as defined herein?
>
> "Answer Yes or No."

The answer of the jury was "Yes". In answering Issue No. 10 the jury found that appellee's injuries resulted in whole or in part from said negligence.

In answering Special Issue No. 2 the jury had found that appellant had not failed to furnish appellee a safe place in which to work.

Appellant contends (1) that Special Issue No. 9 is multifarious and (2) that the jury's answer to the issue is in conflict with the answer to Special Issue No. 2.

The first of the above contentions raises the question, often vexing, of whether an issue as framed is defective because it submits more than one ultimate issue. We have concluded that the issue is not defective in that regard. It has often been held that an issue is not multifarious because it groups several evidentiary or subsidiary facts together, so long as it involves only one ultimate issue. Duff v. Mathews, 300 S.W. 2d 679; Jones v. Scott, 266 S.W. 2d 534; Gray County Gas Co. v. Oldham, 238 S.W. 2d 596; Howell

v. Howell, 147 Tex. 14, 210 S.W. 2d 978; Service Mutual Ins. Co. of Texas v. Territo, et al, 147 S. W. 2d 846. Really only one ultimate issue was inquired about in Special Issue No. 9: whether appellant was negligent in permitting foreign substances to remain in the area in question.

As to the second of appellant's contentions under its Point No. 5 we must give an affirmative answer. The jury's findings in response to Special Issues Nos. 2 and 5 are in conflict.

In Arnold v. Panhandle & S.F. Ry Co., 77 S. Ct. 840, 353 U.S. 360, 1 L. Ed. 2d 889, the jury acquitted the railroad on eight specific acts of negligence, but found that the railroad had not furnished Arnold a safe place in which to work. In holding that the answers were not in conflict the Supreme Court of the United States reasoned that the specific findings were not exhaustive or all-inclusive of the acts which might have constituted negligence, while the unsafe-place-to-work finding was exhaustive and all-encompassing. In other words, the unsafe-place-to-work negligence may have resulted from an act not named or included among the specific acts submitted.

The reverse of the above situation is presented here. In this case the jury answered "No" to an inquiry whether the railroad had failed to furnish appellee a safe place to work, then found from a preponderance of the evidence that the railroad was negligent in permitting chatt, gravel, rocks, mounds of dirt, or debris to remain in the area where appellee alighted from the caboose. Since the safe-place-to-work finding is exhaustive and all-encompassing it cannot

be reconciled with the finding in regard to chatt, gravel, etc. The Arnold case is really authority for holding that the answers here are in conflict.

In support of its view that there is no conflict between the jury's answers to Special Issues Nos. 2 and 9 appellee seeks to invoke the rule that a negative answer to a negligence issue submitted in a negative form is not the same as an affirmative answer of negligence. It merely means that the party having the burden of proof did not establish the non-existence of the condition. Hill v. Leschber, 235 S.W. 2d 236; Gulf States Utilities Co. v. Grubbs, 44 S.W. 2d 1001; 41-B Tex. Jur. 780.

As we view the situation the rule relied on by appellee is not applicable here. In answering Special Issue No. 2 "No" the jury in effect found that appellee had not discharged its burden of showing that appellant had furnished appellee an unsafe place in which to work. In answering Special Issue No. 9 "Yes" the jury in effect found that appellee had discharged its burden of showing that appellant had furnished appellee an unsafe place in which to work. Both answers cannot be correct. We think the test quoted in Pearson v. Doherty, 143 Tex. 64, 183 S.W. 2d 453, (Syl. 2) is applicable here. The two findings are in conflict. We sustain appellant's Point No. 5.

In its sixth and seventh points appellant complains of the submission of Special Issues Nos. 8 and 9 on various grounds. Since we have held that the jury's answer to Issue No. 9 cannot stand we shall not pass upon the question

whether these two related Issues were technically defective in the form in which they were submitted.

In its fifteenth point appellant asserts that the court was in error in overruling appellant's motion for judgment notwithstanding the verdict of the jury. The court could properly have sustained the motion only if there was no evidence to sustain the jury's verdict. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660; Calvert, ". 'No Evidence' and 'Insufficient Evidence' Points of Error," 38 Texas Law Review 361.

Appellee testified that in alighting from the caboose he stepped on an object that "felt like it was about as big as your two fists or bigger." He had earlier signed a statement (which he said he did not know his wife had made out) in which statement he made no mention of a rock or something "about as big as your two fists."

Appellee also testified that his "purpose in getting off on that side of the train was a safe place and a proper place to get off at." He further testified "I selected to get off there, because it the safe place to get off." These last two statements by appellee if taken out of their context would appear to be in conflict with appellee's statement that he stepped on an object as big as both fists. But when appellee's testimony is considered in connection with its context and in connection with his testimony as a whole and with the testimony of other witnesses, the apparent conflict can be reconciled. It was while appellee was being cross-examined as to whether he was negligent in alighting between

two moving trains that he said that he had selected "a safe and proper place to get off at." We quote further from his testimony:

> "Mr. Freels: You got off out there without guarding against moving equipment on an adjacent track, did you not?
>
> "A. No, sir.
>
> "Q. You say you did not?
>
> "A. I got off guarding myself.
>
> "Q. All right, sir. You got off without guarding yourself against unsafe footing, did you not? Is that what you are saying here?
>
> "A. Got off on what I knew to be cleanest place for footing.
>
> "Q. All right, sir. And it is clean out there, isn't it?
>
> "A. The cleanest place. No, sir, it's not clean."

There was ample testimony from other witnesses that the place where appellee alighted was not clear of debris including various substances.

Even if we were to say that appellee's own testimony is conflicting on the question of a safe place to alight, such conflict would raise a fact issue. Overton Refining Co. v. Harmon, 81 S.W. 2d 207 (Rev. on other grounds, 109 S.W. 2d 457); U.S.F. & G. Co. v. McCollum, 70 S.W. 2d 751, Hatley v. Hatcher, 376 S.W. 2d 943; 41-B Tex. Jur. 489; 24 Tex. Jur. 2d 369. Appellant's fifteenth point is overruled.

In its Point No. 19 appellant alleges error of the court in permitting appellee to show notice of conditions at the place he alighted by means of complaints as to the railroad

yard generally as well as the taking of a strike vote with reference to the whole railroad yard.

Evidence concerning the above matters was first objected to on the ground that the questions did not limit the inquiry to the area and time involved. This objection was sustained. Later appellant objected to more limited questions on the ground that the questions were "irrelevant and immaterial," "no proper predicate" and "prejudice". Still later appellant itself brought out the questioned evidence on cross examination. Under the circumstances no reversible error is shown. Medina Electric Coop., Inc. v. Ball, 368 S.W. 2d 227; Bales v. Delhi-Taylor Oil Corp., 362 S.W. 2d 388; Hooten v. Dunbar, 347 S.W. 2d 775; Withers v. Taylor County Lumber Co., 326 S.W. 2d 173; Marsh v. State, 276 S.W. 2d 852. Appellant's Point No. 19 is overruled.

In its Points Nos. 20 and 21 appellant takes the position that (20) there was no evidence to support the submission of Special Issue No. 8 and (21) there was insufficient evidence to support the submission of the issue. Without going into further detail in regard to the evidence, we cannot say that there was no evidence in support of the submission of the issue. And the "no evidence" rule is applicable in weighing these points.

In its Point No. 22 appellant says that the answer of the jury to Special Issue No. 8 is so against the great weight and preponderance of the evidence as to be manifestly wrong. We see no merit in this point. There was ample evidence to support the jury's answer, some of which evidence we have pointed out. Point No. 22 is overruled.

The court submitted Special Issue No. 67 as follows:

> "What per cent, if any, do you find from a preponderance of the evidence does the negligence, if any, of the plaintiff bear to the entire negligence, if any, of both the plaintiff and defendant?"

This issue was accompanied by an instruction that the issue was to be answered only in the event the jury found that contributory negligence on the part of plaintiff proximately caused his own injuries and that negligence on the part of defendant resulted in whole or in part in defendant's injuries. We think the issue was properly submitted. Thompson v. Robbins, 157 Tex. 463, 304 S.W. 2d 111, 116-117. Notwithstanding the instruction the jury answered the issue "75% Plaintiff." In doing so the jury plainly went contrary to the instruction, for none of the contributory negligence issues was answered in the affirmative. Therefore, the answer to Special Issue No. 67 can have no significance. In the absence of any finding of contributory negligence the comparative negligence doctrine, or the diminution of the damages rule can have no application, Thompson v. Robbins, *supra.*

Because of the conflict in the jury's answers to Special Issues Nos. 2 and 9 the judgment of the trial court will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

.....

DIXON, *Chief Justice*

DELIVERED:
May 15, 1964.

C. *Opinion of Court of Civil Appeals on Motion for Rehearing:*

No. 16,343

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
*Appellant,*

*v.*

H. T. SHELTON,
*Appellee.*

FROM THE DISTRICT COURT
OF
GRAYSON COUNTY, TEXAS.

ON MOTION FOR REHEARING

In his motion for rehearing appellee vigorously assails the holding in our original opinion that the jury's answers to Special Issues Nos. 2 and 9 are in irreconcilable conflict, necessitating a reversal of the court's judgment.

Special Issue No. 2, the jury's answer thereto and the instructions to the jury accompanying the submission of the special issue were as follows:

> "Do you find from a preponderance of the evidence that on the occasion in question defendant failed to furnish plaintiff a reasonably safe place in which to work?
>
> "Answer 'yes' or 'no'.
>
> "ANSWER: No.
>
> "You are instructed that defendant was under a duty to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work, and this duty was a continuing one even though the work may have been fleeting or infrequent.

"You are further instructed that the duty to exercise ordinary care to furnish a safe place to work does not have reference only to the physical condition of the place itself but also has reference to the negligent acts, if any, you find of defendant's employees on the occasion in question.

"You are further instructed that this duty is a duty which becomes more imperative as the risk increases."

Special Issue No. 9 is quoted in full in our original opinion, so need not be repeated here.

Appellee insists that the jury's answers to the two issues are consistent with each other and are not at all in conflict. We shall briefly present appellee's contentions in support of this view.

## APPELLEE'S CONTENTIONS

(1) According to appellee the jury's answer of "No" to Special Issue No. 2 can in no wise be construed as an affirmative finding that appellant provided appellee a reasonably safe place in which to work. The answer is merely a finding by the jury that appellee did not discharge his burden of proof under that issue; that the issue as drawn was a "negative submission" which inquires whether the jury finds from a preponderance of the evidence that appellant "failed" or "did not" do a certain act as opposed to an "affirmative" submission, meaning on inquiry whether the jury finds that appellant *did* a certain act.

On the other hand the jury's answer to Special Issue No. 9 is an affirmative finding of a specific act of negligence on the part of appellant. This finding necessarily means that

appellee did discharge hisb urden of proof under the affirmative submission of Special Issue No. 9. In the face of this affirmative finding of negligence appellant cannot escape its liability because the jury found that the evidence did not preponderate under the negative submission of Special Issue No. 2. In support of his argument appellee cites us to Halliburton Oil Well Cementing Co. v. Groves, 308 S.W. 2d 919, 938; Hill v. Leschber, 235 S.W. 2d 236; Gulf States Utilities Co. v. Grubbs, 44 S.W. 2d 1001; 41-B Tex. Jur. 780.

(2) In further support of his contention that the two answers are not in conflict but are consistent with each other appellee makes this argument:

> "Even if the answer to Special Issue No. 2 were to be regarded as an affirmative finding, however, it does not appear there would be irreconcilable conflict between the two issues. From the standpoint of the jury, from all the testimony and evidence in this case, there is a reasonable explanation of the answers to the two issues. The inquiry with respect to furnishing a reasonably safe place in which to work could have been answered by the jury based upon testimony and evidence covering the condition of the entire Ray Yard in Denison, an area of a considerable number of acres. The inquiry was not localized to the area of 'the hump where Plaintiff alighted'; however, with respect to Special Issue No. 9, the inquiry was localized to 'in the area of the hump', and Special Issue No. 9 inquired only about that area, which is only a small fractional part of Ray Yard; the jury had evidence with respect to the Yard generally and had evidence with respect to the specific area of 'the hump.'"

(3) Appellee also reminds us of a rule which has been announced in several Texas cases to the effect that a specific finding will prevail over a general finding in attempting to

reconcile a seeming conflict in jury answers. Ft. Worth & Denver Ry. Co. v. Britton, 310 S.W. 2d 654, 657; Harbin v. City of Beaumont, 146 S.W. 2d 297; Bragg, et al., v. Hughes, 53 S.W. 2d 151.

(4) Appellee says that "this Court cannot under the guise of state procedure defeat substantive rights granted appellee by Congress under the Federal Employers Liability Act." This argument is based on the statement by the Supreme Court of the United States in Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840 as follows, "* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

## OPINION ON REHEARING

We find ourselves unable to agree with appellee.

(1) Appellee's arguments overlook the very important instruction to the jury for its guidance in answering Special Issue No. 2. For emphasis we repeat that instruction: "* * * *the duty to exercise ordinary care to furnish a reasonably safe place to work does not have reference only to the physical condition of the place itself, but also has reference to the negligent acts, if any, you find of defendant's employees on the occasion in question.*" (Emphasis ours)

In the light of the above instruction the effect of the jury's answer of "No" to Special Issue No. 2 was that the jury did not find *from a preponderance of the evidence* that appellant had been guilty of any act of negligence with regard to a safe place to work. Yet in answering Special Issue No. 9 the jury found *from a preponderance of the evidence*

that appellant had been guilty of an act of negligence; permitting chatt, etc. to remain in the area of the hump where appellee alighted from the caboose. The two answers seem to us to be in irreconcilable conflict.

(2) We are also of the opinion that appellee's argument in Paragraph (2) of his contentions becomes wholly untenable when considered in connection with the court's very plain instruction in connection with the submission of Special Issue No. 2 as above quoted.

(3) We are aware of the holdings in the cases cited by appellee in support of his argument No. (3). But we do not consider those holdings applicable here for these reasons:

(a) The holdings refer to a state procedural rule. The Supreme Court of the United States, as cited and quoted by appellee in the Arnold case, refuses to recognize state procedural rules in passing on substantive rights under Federal laws. See also 79 A.L.R. 2d 574.

(b) The Arnold case itself holds in effect that a specific finding of no negligence will not prevail against a general finding of an unsafe place to work because the latter finding is more exhaustive in its scope. In the case now before us the position is reversed. The finding in answer to Special Issue No. 2 is broader in its scope than the answer to Special Issue No. 9. The substance of the jury's answer to Special Issue No. 2, when considered in the light of the instruction accompanying it, is that the jury did not find *from a preponderance of the evidence* that there was any negli-

gence on the part of appellant with respect to a safe place to work. Such finding, in the view of a majority of this court, collides with the jury's answer to Special Issue No. 9 where the jury finds specifically *from a preponderance of the evidence* that there was an act of negligence on the part of appellant: permitting chatt, etc. to remain in the area.

(4) We bow to the holding of the Supreme Court of the United States to the effect that the assertion of Federal rights is not to be defeated under the name of local practice. But we do not consider that rule applicable here, for the question before us involves the substantive rights of the parties * * * the ultimate issue of negligence. Appellee in his Supplemental Motion for Rehearing says, "Appellee agrees with appellant that the safe place to work issue is an ultimate one." He then falls back on his theory that since Special Issue No. 2 was not submitted or answered in affirmative form, there cannot be any conflict in the jury's answers.

Appellee's motion for rehearing is overruled.

OVERRULED.

.....

DIXON, *Chief Justice*

DELIVERED:
October 9, 1964.

No. 16,343

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
*Appellant,*

*v.*

H. T. SHELTON,
*Appellee.*

FROM THE DISTRICT COURT
OF
GRAYSON COUNTY, TEXAS

## DISSENTING OPINION, ON REHEARING

After careful reconsideration and study of the record I find myself unable to agree with my esteemed brethren on the ultimate disposition of this appeal. I am in complete accord with the majority opinion as it relates to all points presented with the exception of the point of error relating to the alleged irreconcilable conflict between Issues Nos. 2 and 9. Since I am unable to agree that a fatal conflict exists I respectfully record by dissent.

The majority has concluded that this case should be reversed solely because of an alleged irreconcilable conflict between the answer of the jury to Special Issue No. 2 and the answer of the jury to Special Issue No. 9. These issues, together with the instruction following Issue No. 2, have been copied verbatim in the original opinion and the opinion on rehearing. The primary question, therefore, is whether a conflict in fact exists between the answers assigned by the jury to the two questions submitted to them. A conflict exists in a jury verdict if the answers to two or

more special issues cannot both be true. When both issues, and the jury's answers thereto, are subjected to a careful exegesis I am convinced that there is no actual conflict at all. Special Issue No. 9 presents no problem. It amounts to an affirmative submission of the question of whether the act on the part of the railroad in permitting chatt, gravel, rust, mounds of dirt, or debris to remain in the area of the hump where plaintiff alighted from the train was negligence. To this question the jury gave an affirmative answer. The plaintiff therefore fulfilled his obligation to discharge the burden of securing the jury answer of "Yes" to this essential element of recovery.

As to Special Issue No. 2, and the jury answer thereto, we have an entirely different situation. By this issue the trial court asked the jury whether they found *from a preponderance of the evidence* that on the occasion in question defendant *failed* to furnish plaintiff a reasonably safe place in which to work. In reply the jury said "No". What did the jury mean by this answer? I can conceive of no other meaning than that the answer is merely a finding by the jury that appellee did not discharge his burden of proof as to *that issue*. It must be observed that the issue, as submitted, amounted to a "negative submission" as opposed to an "affirmative submission" as in Special Issue No. 9. The answer "No" to such issue merely means that the jury found that the evidence did not preponderate in favor of a finding of failure to provide a reasonably safe place to work. However, the mere fact that the plaintiff failed to sustain his burden of proof on this issue alone cannot reasonably be said to be

equivalent to an affirmative finding that the railroad company did provide appellee with a reasonably safe place to work on the occasion in question, or that its servants were not negligent in any particular act or omission.

Thus we have a situation where the appellee has failed to sustain his burden of proof and secure a finding on his *general issue* of failure to provide a safe place to work but, in Special Issue No. 9, appellee has successfully maintained his burden of proof to establish *specific negligence* which contributed to bring about his injuries. I conclude that the jury's answer to Special Issue No. 2 is not an affirmative finding of any fact, or omission of duty, but is nothing more than a statement by the jury that the evidence presented by appellee was not sufficient to preponderate the evidence in favor of the finding sought by the issue. The mere failure to support his burden of proof on this issue does not, as a matter of law, amount to a converse finding against appellee. 41-B Tex. Jur. 780; Halliburton Oil Well Cementing Co. v. Groves, 308 S.W. 2d 919, 938; Hill v. Leschber, 235 S.W. 2d 236; Gulf States Utilities Co. v. Grubbs, 44 S.W. 2d 1001. Accordingly, both answers of the jury to the two special issues involved may be well true and yet not be in conflict.

Even though we should assume, *arguendo*, that the answer of the jury to Special Issue No. 2 amounted to an affirmative finding, as contended by appellant, and as found by the majority in their opinion on rehearing, there is, in my judgment, a compelling reason why there is no fatal or irreconcilable conflict between that answer and the answer of the jury to

Special Issue No. 9. By both state and federal law we are enjoined to the performance of a duty to construe verdicts as not being irreconcilably conflicting when there is any reasonable explanation of seeming conflicts. Courts should always assume the honesty and at least ordinary intelligence of a jury and that they never intend that their specific findings of fact should be destroyed by a general finding in seeming conflict therewith. 41-B Tex. Jur., Sec. 580, p. 795; Bragg et al v. Hughes, Civ. App., 53 S.W. 2d 151; Ford v. Carpenter, 147 Tex. 447, 216 S.W. 2d 558, 562.

In Gallick v. B. & O. RR. Co., 372 U.S. 108, 9 L. Ed. 2d 618, 83 S. Ct. 659, the United States Supreme Court said:

> "But it is the duty of the courts to harmonize the answers, if it is possible under a fair reading of them. 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd, 369 U.S. 355. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360; McVey v. Phillips Petroleum Co., 288 F. 2d 53; Morris v. Pennsylvania R. Co., 187 F. 2d 837, before we are free to disregard the jury's special verdict and remand the case for a new trial."

Applying these well established rules to the record before us, it is evident that we can, as we must, reconcile the jury's answers to these issues. Special Issue No. 2 was a general issue, whereas Special Issue No. 9 was a specific issue of specific negligence. The specific finding of the jury in answer to Special Issue No. 9 should prevail over any possible general finding as contained in Special Issue No. 2 when we attempt to reconcile an alleged conflict in jury

answers. Ft. Worth & Denver Ry. Co. v. Britton, 310 S.W. 2d 654, 657; Harbin v. City of Beaumont, 146 S.W. 2d 297; Bragg et al v. Hughes, 53 S.W. 2d 151; Panhandle & Santa Fe Ry. Co. v. Arnold, 283 S.W. 2d 303, reversed, 353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840.

In my opinion the majority has applied a strained and harsh construction upon the alleged conflicting verdict of the jury in this case. I believe that the law imposes upon us, as a reviewing court, the duty of analyzing the jury's verdict in the most favorable light and resolving any possible conflict so that the verdict may stand, rather than fall. In my humble judgment this verdict presents one that can easily be reconciled, and should be reconciled, in the interest of justice.

Finally, I think that we must bear in mind that we are here dealing with a Federal remedial statute, the Federal Employers' Liability Act. The Supreme Court of the United States has repeatedly held that this Federal remedial statute is liberally construed in favor of an injured workman. As stated by the Supreme Court of the United States in Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840: "* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

In Davis v. Wechsler, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143, the Supreme Court of the United States said:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

The majority contends that the question before us involves the substantive rights of the parties rather than procedural rights. I cannot agree. I believe that the same substantial question of states procedural rights is involved here as was involved in Arnold. In this case Shelton has sustained his burden to establish an affirmative finding of negligence on the part of the railroad company which contributed to cause his injuries for which the jury said he should be compensated. The mere fact that Shelton failed to introduce sufficient evidence, in the opinion of the jury, to preponderate in favor of his general allegation of failure to provide a safe place to work, does not, in my judgment, defeat his right to recover under this Federal statute.

I would sustain the motion for rehearing and affirm the judgment of the trial court.

.....

WILLIAMS, *Associate Justice*

DELIVERED:
October 9, 1964.

**D. *Order Refusing Petitioner's Application for Writ of Error and Order Overruling Petitioner's Motion for Rehearing on Application for Writ of Error:***

IN THE SUPREME COURT OF TEXAS

**No. A-10,487**

H. T. SHELTON

*v.*

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

FROM GRAYSON COUNTY,

FIFTH DISTRICT.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, H. T. Shelton, pay all costs incurred on this application.

No. A-10,487

H. T. SHELTON

*v.*

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

FROM GRAYSON COUNTY,

FIFTH DISTRICT.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

## APPENDIX B

II. Federal Employers Liability Act, 45 U.S.C., Sec. 51:

"Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence — Definition of employees —

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act (Secs. 51-60 of this title), be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act (Secs. 51-60 of this title) and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases." (approved April 22, 1908) (Secs. 51-60 of this title), as the same has been or may hereafter be amended. (Apr. 22, 1908, c. 149, Secs. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404)."

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In the

# Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 213

H. T. SHELTON,

*Petitioner,*

*v.*

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

*Respondent.*

*On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas*

## BRIEF FOR RESPONDENT IN OPPOSITION

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In the

# Supreme Court of the United States

OCTOBER TERM, 1964

---

No. 1240

---

H. T. SHELTON,

*Petitioner,*

*v.*

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

*Respondent.*

---

*On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas*

---

## BRIEF FOR RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court (15th Judicial District of Texas) is unreported, but is printed as Sec. A of App. A of Petition, p. 35.

The original opinion of the intermediate appellate court (Court of Civil Appeals, Fifth Supreme Judicial District of Texas) is reported at 383 S.W. 2d 842, and printed as Sec. B of App. A of Petition, p. 45.

That Court's opinion on rehearing (including the dissenting opinion of Justice Williams) is reported at 383 S.W. 2d 849, and printed as Sec. C. of App. A of Petition, p. 58.

The orders of the Supreme Court of Texas refusing petitioner's application for writ of error, with notation, no reversible error, and denying rehearing thereof are not reported, but are printed as Sec. D of App. A of Petition, p. 70, 71.

## JURISDICTION

Respondent believes that this Court is without jurisdiction to grant certiorari in this cause. It was this knowledge which prevented respondent from seeking certiorari from this Court upon a far more dramatic and important issue: whether causation "in part" will apply to respondent's negligence but not to petitioner's negligence.

Respondent submits that there is no final judgment or decree rendered by the highest state court which is the indispensable prerequisite to review by certiorari. 28 U.S.C.A. 1257.

Initially, the judgment of the Texas Court of Civil Appeals lacks finality because it is a judgment of reversal remanding the case to the lower court for a re-trial.

After reviewing the aspects of the finality of state court judgments, this Court spoke clearly on this point in *Gospel*

*Army v. City of Los Angeles*, 331 U.S. 543, 91 L. Ed. 1662, 67 S. Ct. 1428, (1947):

> "Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

In *Urie v. Thompson*, 337 U.S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018, 11 A.L.R. 2d 252, (1949), where the Court was concerned with the finality of a prior state decision reversing and remanding the case, this Court again spoke most clearly:

> "The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute."

This rule is supported by many precedents, of both early and late vintage. *Chesapeake & O. R. Co. v. McCale* (1909), 213 U.S. 207, 53 L. Ed 765, 29 S. Ct. 430; *Missouri & K.I. R. Co. v. City of Olathe* (1911), 222 U.S. 328, 56 L. Ed. 155, 32 S. Ct. 46; *Louisiana Nav. Co. v. Oyster Commission of Louisiana* (1912), 226 U S. 99, 57 L. Ed. 138, 33 S. Ct. 78; *Bruce v. Tobin* (1917), 245 U.S. 18, 62 L. Ed. 123, 38 S. Ct. 7; *Southern P. Co. v. Gileo* (1956), 351 U.S. 493, 100 L. Ed. 1357, 76 S. Ct. 952.

The rule is likewise well delineated in the textbooks. 54 Am. Jur., p. 820, sec. 186.

The reversal and remand for another trial insures a completely new trial as though no former trial had been had. *Seydler v. Keuper*, (Austin Civ. App. 1939, writ ref.), 133 S.W. 2d 189; *Chicago R.I. & G. Ry. Co. v. Cummings*, (Waco Civ. App. 1937), 107 S.W. 2d 644, (writ dismissed).

It places the parties litigant in the same position occupied by them prior to the judgment in question. 4 Tex. Jur. 2d, p. 671, sec. 987.

Additionally, the judgment below lacks finality because the Court of Civil Appeals expressly declined to rule upon respondent's Points of Error Nos. 6 and 7, (Appendix, p. 53, 54, Opinion of Court of Civil Appeals). The language there was:

> "In its sixth and seventh points appellant complains of the submission of Special Issues Nos. 8 and 9 on various grounds. Since we have held that the jury's answer to Issue No. 9 cannot stand we shall not pass upon the question whether these two related Issues were technically defective in the form in which they were submitted."

Under the applicable procedure in Texas, the Courts of Civil Appeals are required to pass upon all issues presented by proper assignments. Rule 451, Texas Rules of Civil Procedure.

Any reversal of the judgment of the Court of Civil Appeals would necessarily leave the Points of Error Nos. 6 and 7, there raised, undecided. This cause would properly be remanded to that court to pass upon them. *Bennett v. Copeland,* (Tex. Sup. Ct. 1951), 235 S.W. 2d 605; *Block v. Aetna Casualty & Surety Co.,* (Tex. Sup. Ct. 1942), 159 S.W. 2d 470; *Wood v. Kane Boiler Works,* (Tex. Sup. Ct. 1951), 238 S.W. 2d 169.

It is obvious that this judgment lacks finality and must await its culmination in the judicial processes of the Texas

courts. *Republic Natural Gas Co. v. Oklahoma* (1948), 334 U.S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

This rule could not have been more forcefully enunciated than it was in *Gorman v. Washington University* (1942), 316 U.S. 98, 86 L. Ed. 1300, 62 S. Ct. 962; and in *Great Western Telegraph Co. v. Burnham* (1896), 162 U.S. 339, 40 L. Ed. 991, 16 S. Ct. 850.

Any granting of certiorari would thus result in fragmentation of the judicial process. It would result in piecemeal decision, dissipation of judicial energy and abdication of judicial policy. *Catlin v. United States*, (1921), 324 U.S. 229, 89 L. Ed. 911, 65 S. Ct. 631.

The judgment lacking finality, petitioner's burden of affirmatively showing jurisdiction has thus not been discharged. *Memphis Natural Gas Co. v. Beeler* (1942), 315 U.S. 649, 86 L. Ed. 1090, 62 S. Ct. 857. The application should be denied.

## QUESTION PRESENTED

Whether, under Texas Special Issue procedure, a jury's negative answer to an inquiry as to whether respondent furnished petitioner a reasonably safe place in which to work accompanied by a definition, which defined it to cover negligent acts and commanded the jury to so apply it and find whether respondent had committed any negligent acts, was in irreconcilable conflict with its affirmative answer that respondent had committed a negligent act in permitting chatt, gravel, rocks, mounds of dirt or debris to remain in the area where petitioner alighted from the caboose.

## STATEMENT

Respondent must challenge the accuracy of three assertions in petitioner's statement; all of which appear on page 5 of the Petition.

The first asserts that petitioner injured his back when he stepped on debris accumulated along the tracks in the area where he alighted. His pleading and proof was that he was injured by being struck in the back by a bay window, protruding from a caboose of the train from which he was alighting, and being thrown to the ground and into an engine eastbound on an adjacent track. (Tr. 3; S.F. 36)

The second asserts that Special Issue No. 9 inquires whether respondent permitted chatt, etc. to remain in the area; whereas, this issue actually inquires whether such act was negligence. (Tr. 86; App. 37)

The third assertion is that the Court of Civil Appeals rejected all contentions of respondent other than the asserted conflict. Actually, it did not do so since it declined to, and did not, pass upon the contentions in respondent's Sixth and Seventh Points of Error. (App. 53)

Traveling westward into respondent's Ray Terminal Yard on the first of two cabooses on the rear end of a switch train, petitioner ended his run by alighting from the north side near a graveled road crossing. (S.F. 28, 35) The first caboose was a cupola type; the second had a protrusion from the side in a bay window effect. (S.F. 1320, 1317)

Petitioner claimed he stepped on an object or something unidentified which was about the size of two fists or larger, lost his balance and was struck in the back by the protrusion on the last caboose. He claims to have been then thrown into an engine, eastbound on the adjacent track to the north, which he had theretofore seen but believed was stationary, and sustained injury. (S.F. 36, 37, 38)

The area where petitioner chose to alight between the north and south set of tracks and prior to reaching the switchstand is shown by pictures looking westward. (Deft. Ex. 12, p. 1325; Pltf. Ex. 13, p. 1297; Pltf. Ex. 57, p. 1307) A more distant view is shown looking eastward. (Deft. Ex. 11, p. 1224)

This conduct of petitioner in so alighting was found by the jury to be negligence, but it failed to find the required causation. (Tr. 95)

The jury failed to find that the eastbound engine struck petitioner as he claimed or that the bay window caboose was dangerous under the circumstances as he claimed. (Tr. 8, 13) In fact, only one of the many grounds of negligence submitted was found against respondent.

The jury also found that of the combined negligence, 75% was attributable to petitioner under a diminution of damage issue conditionally submitted.

The Court disregarded this finding, although the jury had earlier found petitioner guilty of contributory negligence, due to a failure to find there the required causation.

The jury found that, at some undesignated and undetermined time in the past, respondent permitted "either chatt, gravel, rocks, mounds of dirt or debris to remain in the area of the hump where plaintiff alighted from said caboose."

Thereafter, the jury answered Special Issue No. 9, which issue and answer read:

> "SPECIAL ISSUE NO. 9:
>
> Do you find from a preponderance of the evidence that such act in permitting either chatt, gravel, rocks, mounds of dirt, or debris to remain in the area of the hump where Plaintiff alighted from said caboose, if you have so found in answer to the preceding Special Issue, was negligence, as defined herein?
>
> ANSWER: Yes." (Tr. 86; App. A, p. 36)

The requisite causation "in whole or in part" was found. (Tr. 86; App. A, p. 36)

The safe place to work issue had just been submitted with instructions and answered as follows:

> "SPECIAL ISSUE NO. 2:
>
> Do you find from a preponderance of the evidence that on the occasion in question Defendant failed to furnish Plaintiff a reasonably safe place in which to work?
>
> ANSWER: Yes or No.
>
> ANSWER: No.
>
> You are instructed the Defendant was under a duty to exercise ordinary care to furnish Plaintiff a reasonably safe place in which to work, and this duty was a continuing one even though the work may have been fleeting or infrequent.

> You are further instructed that *the duty to exercise ordinary care to furnish a safe place to work* does not have reference only to the physical condition of the place itself, *but also has reference to the negligent acts*, if any, you find of Defendant's employees on the occasion in question.
>
> You are further instructed that this duty is a duty which becomes more imperative as the risk increases." (Tr. 84; App. A, p. 36) (Italics supplied)

The Court of Civil Appeals found that these two answers, taken with the issues and accompanying definitions, to be in irreconcilable conflict and reversed and remanded the cause for a new trial.

## ARGUMENT

The first reason petitioner advances for the grant of a writ of certiorari is ill-founded.

The Court of Civil Appeals did not misconstrue the *Arnold* decision nor is there any support for the charge that it is engaged in restrictive interpretations as to railroad employees or attempting to side-step any holding of this Court.

The Court of Civil Appeals did not misconstrue the *Arnold* decision. Its interpretation of that case is precisely correct:

> "The Arnold case itself holds that a specific finding of no negligence will not prevail against a general finding of an unsafe place to work because the latter finding is more exhaustive in its scope." (App. to Petition 62)

The position in this cause is the reverse of *Arnold* and the Court of Civil Appeals so held. The safe place to work

finding (Special Issue No. 2) is broader than the evidentiary finding concerning chatt, gravel, etc. (Special Issue No. 9) and the Court of Civil Appeals so held. In the light of the definition given, the Court of Civil Appeals simply concluded that "the jury did not find from a preponderance of the evidence that there was any negligence on the part of appellant *(respondent here)* with reference to a safe place to work."

When the jury found negligence on the part of respondent with reference to a component going to make up a safe place to work, the Court of Civil Appeals simply held the findings "collided" and were in conflict.

The foregoing clearly demonstrates that the Court of Civil Appeals did not misconstrue *Arnold*, but to the contrary, it correctly construed that decision.

There is no support for petitioner's bald assertion that the Federal Employer's Liability Act is not understood in the light of the liberal interpretations of this Court. A mere reading of the opinions below reveals that this Act and the opinions of this Court, many of which are cited, are fully understood. The Court of Civil Appeals clearly is aware of the liberal intent and beneficent purposes of the Act and conversant with the far reaching opinions of this Court construing it.

Respondent corporation could only act through its employees and any negligent act or failure could only arise through its employees.

The generic conception of an unsafe place to work is comprehensive and must necessarily embrace and comprehend any separate components which go to make the place unsafe. In this sense, it is all encompassing. It is exhaustive in the sense that the total is the sum of all of its parts. This has to be the basic premise of *Arnold*.

An affirmative finding of an unsafe place in which to work is not exhausted by negative findings upon some of the facets which would go to make it unsafe.

Until all has been thus exhausted, the greater would control the lesser and no conflict could arise.

This, assuredly, is the ratio decidendi of *Arnold* and the Court of Civil Appeals so appraised it.

The converse is surely true. It is utterly inconsistent and contradictory to say that the whole is not unsafe and simultaneously aver that the condition of some constituent part or portion thereof is unsafe.

Wherever Shelton's work took him was assuredly his place to work. The place where he alighted was then his place of work.

It cannot be consistently adjudged not unsafe and yet a part thereof unsafe.

Respondent cannot be exonerated of failing to use ordinary care in furnishing a safe place to work and convicted of such failure with reference to a portion or part of the place without the grossest inconsistency.

This is the logical and only concomitant of the *Arnold* holding.

Nor has the Court of Civil Appeals resorted to any procedural nicety, as petitioner charges. Respondent simply contended that the safe place to work issue, like proper control and proper lookout, was generic and ultimate. Petitioner agreed (Sec. B of Appendix A of Petition, p. 63) and the Court simply pointed this out. It was simply petitioner's recognition of a substantive right. As an ultimate issue, it controlled over component, evidentiary finding under much basic Texas precedent.

Certainly the implicit holding of the Court in the *Arnold* case (353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, reversing 283 S.W. 2d 303) is that the safe place to work issue is exhaustive and all inclusive and that it will control over specific findings. That opinion certainly holds that this issue controls until a conflict is established and that such conflict cannot arise until every possible ground upon which an unsafe place to work finding can be based or from which any such inference can be drawn or any such conclusion made has been fully exhausted.

The holding in the *Arnold* case cannot be misunderstood. It definitely holds that in FELA cases, a safe place to work issue is an ultimate issue that is not exhausted or ruled by specific inquiries into component factors of that issue.

It also and additionally is obvious that not only is Special Issue No. 2 a controlling and ultimate issue, but that Special Issues Nos. 8 and 9 are evidentiary issues.

That the safe place to work issue was an ultimate issue is clear and petitioner so concedes and admits that it was.

*Texas City Transp. Co. v. Winters*, 222 S.W. 541, (Com. App. 1920) rev. *Texas City Transp. Co. v. Winters*, 193 S.W. 366, (Galveston Civ. App. 1917). These cases further held that a negative answer to that issue would entitle the defendant to a judgment, absent any conflict.

In *McElwrath v. City of McGregor*, 58 S.W. 2d 851, (Waco Civ. App. 1933, er. dismissed), the jury found asphalt pavement defects were due to "defective materials, workmanship, plans, methods and processes" and in other issues that the contractor used too much oil, and that he did not use enough oil in mixing the asphalt in answer to claimed conflict. The court held the first issue was a controlling and ultimate issue, and further said:

> "The issues as to the particular manner or respect in which the processes as used were defective were evidentiary issues, and the findings of the jury in answer thereto would become immaterial."

Whether chatt, gravel, rocks, mounds of dirt or debris were in the area of the hump were only details of a reasonably safe place to work issue. They were simply evidentiary factors for the jury to consider in determining whether on the occasion in question, it could have been used with safety by a person using ordinary care. This was only part of a fact — part of the breadth and gravity of the safe place to work issue.

This inquiry should not have been submitted because it was evidentiary. That it was erroneously submitted and answered makes it no less evidentiary. *Southern Surety Co. v. Adams*, 34 S.W. 2d 789, (Tex. Sup. Ct., 1930).

Petitioner has attempted to raise himself by his own bootstraps and by pure semantics convert failure and omission into an action and commission. But "permitted" can mean no more than "failure to prevent." *Morris v. Texas & N.O.R. Co.*, 269 S.W. 2d 565, (Beaumont Civ. App. 1954, writ ref. n.r.e.).

Any reasoned analysis discloses that Special Issues Nos. 8 and 9 were evidentiary and concerned with evidentiary matters. *Meadowlake Foods v. Estes*, 218 S.W. 2d 862, (El Paso Civ. App. 1948, writ ref. n.r.e., 219 S.W. 2d 441).

It appears to respondent that petitioner's entire contentions are fully answered by the argument advanced by his own counsel in *Franklin v. Love*, 276 S.W. 2d 927, (Amarillo Civ. App. 1954, writ ref. n.r.e.). Petitioner's counsel here, and Justice Williams who wrote the dissenting opinion in the Court of Civil Appeals, represented the successful appellee in that case and there successfully urged the same contentions which respondent contends are applicable here.

After convicting appellant Franklin of negligence the conduct of appellee was submitted:

> "Special Issue No. 20:
>
> Do you find from a preponderance of the evidence that at the time, place and on the occasion in question Florence L. Love failed to keep a proper lookout?
>
> Answer: No."

The jury then convicted appellee Love in the following issue:

> "Special Issue No. 24:
>
> Do you find from a preponderance of the evidence that at the time, place and on the occasion in question

> Florence L. Love proceeded to cross the roadway in question with her back partially turned to approaching traffic?
>
> Answer: Yes."

Appellee's counsel there (and petitioner's counsel here) contended successfully there that the "no" answer to a proper lookout issue was not merely a failure of the evidence to preponderate, as they do here, a positive finding of an ultimate fact issue which controlled an evidentiary issue and that the latter was properly disregarded. The court agreed saying:

> "Under appellant's three points of error, the ultimate issue on this phase of the case was whether appellee failed to keep a proper lookout. The jury found that she did not fail to keep a proper lookout and in arriving at a finding on this ultimate issue they were entitled to take into consideration the evidence that appellant proceeded to cross the roadway with her back partially turned to the approaching traffic. But, the manner in which appellee proceeded to cross the roadway was not an ultimate fact issue but merely an evidentiary issue which the trial court properly disregarded in rendering judgment for appellee on the jury verdict."

The court disregarded the answers of the jury to Special Issue No. 24 and its subsidiary issue and rendered judgment for appellee Love.

Such an issue is therefore without effect, and in the event of a conflict, such evidentiary issue should be disregarded. *Bueche v. Eickenroht*, 220 S.W. 2d 911, (San Antonio Civ. App. 1919).

If the Court should hold the existence of chatt, gravel, rocks, mounds of dirt or debris are not ingredients or ele-

ments evidentiary of a reasonably safe place to work, then the conflict is fatal and irreconcilable.

These findings would then fall squarely within the rules governing such conflicts. In addition to the controlling cases cited above may be added *Grice v. Hennessey*, 327 S.W. 2d 629, (San Antonio Civ. App. 1959, no writ hist.).

The holding of the Court of Civil Appeals is therefore in this regard precisely and wholly correct.

Petitioner seeks to convert the holding of the *Arnold* case into a "heads I win, tails you lose" doctrine, but this case does not admit of that interpretation. If, under the authority of the *Arnold* case, the safe place to work issue established liability upon an affirmative answer, and remains so until every possible ground upon which it could be based has been exhausted, then a negative finding to that issue certainly established that it was not unsafe for one using ordinary care.

Petitioner's contention that a negative answer to the safe place to work issue merely establishes that the evidence did not preponderate and cannot serve as a basis for conflict lacks validity.

A simple illustration reveals how incongruous the contention is. Assume, arguendo, that only the following issues were submitted and that only the following answers made by the jury:

> "Special Issue No. 1:
>
> Do you find from a preponderance of the evidence that defendant failed to furnish plaintiff a safe place in which to work?
>
> Answer: Yes.

Special Issue No. 2:

Do you find from a preponderance of the evidence that defendant failed to furnish plaintiff a safe place in which to work?

Answer: No."

Anyone would immediately recognize that such answers were in direct and irreconcilable conflict. Yet, according to the argument petitioner advances here, such answers would not conflict. He would contend that Special Issue No. 1 was an affirmative and controlling finding and Special Issue No. 2 was immaterial since it established only that the evidence did not preponderate. According to his contention, the plaintiff would thus recover.

Insofar as a conflict is concerned, *New St. Anthony Hotel Co. v. Pryor*, 132 S.W. 2d 620, (San Antonio Civ. App. 1939, writ refused) seems to be a controlling authority. After finding that Mrs. Pryor slipped down on the floor at a point where the hotel company had caused a slippery condition to exist, the jury then answered Special Issue No. 4, which reads as follows:

"Special Issue No. 4:

Do you find from a preponderance of the evidence that the defendant was negligent in causing said slippery condition to exist, if you have found that the defendant did cause said condition to exist? Answer yes or no.

We, the jury, answer: No."

The jury, proceeding then to find that there was water at the place where she slipped and caused by the defendant to be there, then answered Special Issue No. 8 as follows:

> "Special Issue No. 8:
>
> Do you find from a preponderance of the evidence that said defendant was in negligent in causing water to be at said place and that Mrs. Pryor slipped?
>
> We, the jury, answer: Yes."

The *Pryor* case completely refutes petitioner's contention that a "yes" answer is an affirmative finding but that a "no" answer only indicates a failure of the evidence to preponderate. It completely obliterates his contention that a negative answer is not exonerating. The court at pages 623-624, said:

> "It will be noted that question No. 2 was not limited in any way, but was all inclusive, therefore, when the jury found that the Hotel Company was not negligent in maintaining the floor in its slippery condition, it included all causes of the slippery condition, whether they be butter, water, wax, or the material from which the floor was constructed."
>
> "* * *
>
> "*Appellant could not be exonerated from negligence in causing the floor to be slippery from all causes whatsoever in one set of questions and convicted of negligence in causing the floor to be slippery by causing water to be on the floor* in another set of questions." (Italics supplied)

There are many cases which set forth findings and make determinations which refute petitioner's contention in this regard. *Hancock v. Sammons*, 267 S.W. 2d 252, (Ft. Worth Civ. App. 1954, writ ref. n.r.e.); *Graham v. Dallas Ry. & Term. Co.*, 165 S.W. 2d 1002, (Dallas Civ. App. 1942, writ

refused); *Armstrong v. Missouri-Kansas-Texas R.R. Co.*, 233 S.W. 2d 942, (Dallas Civ. App. 1950, writ ref. n.r.e.; cert. ref. 342 U.S. 837, 96 L. Ed. 633, 72 S. Ct. 62); *Miller v. Texas Employers*, 63 S.W. 2d 883, (Dallas Civ. App. 1933, no writ hist.).

If the answer to Special Issue No. 2 be not viewed as an affirmative finding, then unquestionably under the foregoing authorities there is a conflict between the answers and issues under consideration.

The rules of construction so holding are set forth in *Pearson v. Doherty*, 183 S.W. 2d 453, (Texas 1944), and more recently in *Bradford v. Arhelger*, 340 S.W. 2d 772, (Texas 1960).

If the answers to Special Issues Nos. 8 and 9 are disregarded, then respondent is entitled to judgment. If the answer to Special Issue No. 2 is disregarded, then petitioner could conceivably be entitled to a judgment.

A conflict is thereby produced. *Lewis v. Texas Emp. Ins. Ass'n.*, 197 S.W. 2d 187, (Dallas Civ. App. 1946, writ ref. n.r.e.); *Little Rock Furniture Co. v. Dunn*, 222 S.W. 2d 985, (Texas 1949); and *Bradford v. Arhelger*, supra.

Such conflict is irreconcilable.

There is an additional reason which further demonstrates the fatal conflict produced.

Remembering that respondent corporation could only act in this cause through its employees and any negligent act or failure could only arise through its employees, consider the issues and pertinent portions in dispute:

"SPECIAL ISSUE NO. 2:

Do you find from a preponderance of the evidence that on the occasion in question defendant failed to furnish plaintiff a reasonably safe place in which to work?

Answer 'Yes' or 'No.'

Answer: No.

You are instructed that defendant was under a duty to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work.* * *

You are further instructed that the duty to exercise ordinary care to furnish a safe place to work * * * *has reference to the negligent acts*, if any, you find of defendant's employees on the occasion in question * * * *"* (Tr. 84) (Italics supplied)

"SPECIAL ISSUE NO. 9:

Do you find from a preponderance of the evidence that *such act* in permitting either chatt, gravel, rocks, mounds of dirt or debris to remain in the area of the hump where plaintiff alighted from the caboose * * * was negligence * * **?"*

Answer 'Yes' or 'No.'

Answer: Yes" (Tr. 86) (Italics supplied)

A safe place to work inquiry which a jury answers negatively after being expressly told that it has reference to negligent acts certainly conflicts with an inquiry into a part

of that place which the jury finds to be a negligent act. This is irreconcilable and demonstrably and fatally so upon its face. The opinion reveals that this instruction was not present in the *Arnold* case and it furnishes added reason and emphasis to the correctness of the interpretation of the Court of Civil Appeals.

The *Gallick* case is not authority here. True, it does hold that issues should be harmonized if they can be, by exegesis if necessary, but this principle is recognized and followed. However, it does not mean that there can never be a conflict of findings in an FELA case. A careful reading of that opinion discloses that it is not authority here. *Gallick v. Baltimore & O. R. Co.*, (1963), 372 U.S. 108, 9 L. Ed. 2d 618, 83 S. Ct. 659.

Petitioner, in apparent frustration, finally contends that the Texas rule of construction should have been resorted to and the verdict harmonized by holding that the specific controlled the general findings. He recognized that this was the precise point in *Arnold*, but he says disregard that decision here. On the one hand, petitioner is critical of the court that follows the logic of *Arnold* in reverse, and on the other hand says it should be absolutely disregarded in the other direction. To him precedent is a one way street in an FELA case, but the blind goddess of justice does not hold half a scale.

In apparent desperation, petitioner contends that reconciliation of the conflict can be produced by holding that

the safe place to work issue referred to another part of the yard or to an area of many acres.

He completely glosses over the meaning of "the occasion in question," in Special Issue No. 2. This term can only mean the necessity or need at the particular time of the accident and having reference to the continuing duty of respondent existing then and there. *Henderson v. Southern Ry. Co.*, 238 Ala. 356, 191 So. 234; *Mackey v. Baltimore & O. R. Co.*, 19 D.C. 282 at 301.

This inquiry was directed to and could only mean the necessity and need at the time plaintiff claims to have alighted from the caboose.

To the contrary, Special Issues Nos. 8 and 9 refer to no time and could not legitimately serve as a basis of any liability.

Indeed, respondent has contended throughout that these issues were evidentiary and never ultimate and were never possessed of sufficient certainty and, perforce, it was entitled to a judgment upon the verdict of the jury, not petitioner.

But, if Issues Nos. 8 and 9 should not be disregarded, then an irreconcilable conflict results.

Since no final judgment exists herein, and no special and important reasons or episodic issues are involved, petition for certiorari should be denied.

## PRAYER

Respondent prays that the petition for writ of certiorari be, in all things, denied.

Respectfully submitted,

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MISSOURI-KANSAS-TEXAS RAILROAD CO.

By: William Raeyn Elliott

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Petitioner's Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas has been furnished to Messrs. Charles Gullett and Robert Doss, Citizens National Bank Building, Denison, Texas, and Mr. Russell M. Baker, 1610 Tower Petroleum Building, Dallas, Texas, attorneys for Petitioner, by placing same in the United States Mail, properly addressed and stamped, certified mail, return receipt requested, on this the 28th day of June, 1965.

William Raeyn Elliott